DOCUMENT RESUME

ED 295 891 SO 019 194

AUTHOR Hepburn, Mary A., Ed.; And Others
TITLE Constitution 200: A Bicentennial Collection of Essays.
INSTITUTION Georgia Univ., Athens. Carl Vinson Inst. of Government.
SPONS AGENCY National Endowment for the Humanities (NFAH), Washington, D.C.
REPORT NO ISBN-0-89854-126-3
PUB DATE 88
NOTE 192p.; For related document, see SO 019 193.
AVAILABLE FROM Carl Vinson Institute of Government, Terrell Hall, University of Georgia, Athens, GA 30602 ($5.95).
PUB TYPE Books (010) -- Collected Works - General (020)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Civil Rights; *Constitutional History; *Constitutional Law; Due Process; Equal Protection; Justice; Secondary Education; Social Studies; United States Government (Course)
IDENTIFIERS Federalism; Fourteenth Amendment; Judicial Review; Religious Freedom; Separation of Powers; *United States Constitution

ABSTRACT

Constitutional essays which formed the basis of public assemblies throughout three states are compiled in this book. The first three essays consider the U.S. government principles of federalism, judicial review, and the separation of powers. Michael L. Benedict proposes that the question of ultimate sovereignty has been answered differently by various groups according to their political needs. Martha I. Morgan, examines the source and extent of the power of the U.S. Supreme Court to review the constitutionality of state and federal acts. Richard H. Cox discusses the principle of the separation of powers. The remaining essays review issues related to the rights of the individual. The fourth essay (L. Carter) discusses separation of church and state. Procedural guarantees and the extension of the protections to the states through Supreme Court interpretation of the 14th Amendment are outlined in essay five (S. Talarico and E. Fairchild). The sixth essay (T. Freyer) traces the development of black voting rights. Essay seven (C. Bullock III) traces the expansion of federal issues based on the equal protection clause of the 14th Amendment. The closing essay (J. Soma and S. Oran) discusses privacy rights as they relate to personal information in an advanced information technology era. (SM)

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Edited by
Mary A. Hepburn

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Constitution 200

A Bicentennial Collection of Essays

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A Bicentennial Collection of Essays

Edited by
Mary A. Hepburn

with the assistance of
Mary O'Briant and Inge Whittle

This publication was made possible by a grant from the National Endowment for the Humanities, a federal agency, to the Carl Vinson Institute of Government for the Constitution 200 Project.

Carl Vinson Institute of Government
University of Georgia

Constitution 200: A Bicentennial Collection of Essays

Design and production: Reid McCallister
Typesetting: Anne Huddleston
Proofreading: Susan McLain, John Gaither
Institute Publications coordinator: Emily Honigberg

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Library of Congress Cataloging-in-Publication Data Pending
ISBN 0-89854-126-3

Photo Credits: Edwin Jackson, 10, 86, 105, 144, 160, 167; Library of Congress, frontispiece, 16, 25, 33, 52, 79, 83, 98, 125; Project '87, 62; National Archives, 114, 136.
Cartoon: Bob Gorrell, *Richmond News Leader*, 54.

Foreword

The year 1987 was a special one in the life of the United States of America, in that "We the people" celebrated the 200th anniversary of the signing of our charter, the United States Constitution. Like mushrooms springing up in a field, bicentennial activities were undertaken throughout the land to commemorate this historic event. The Carl Vinson Institute of Government of the University of Georgia has been pleased to play a part, very early on, in these bicentennial activities by sponsoring, with the support of the National Endowment for the Humanities, the Constitution 200 Project. This reader, *Constitution 200: A Bicentennial Collection of Essays*, is the concluding contribution of the project.

The Constitution 200 Project was launched in 1985 to stimulate public interest in and knowledge of the U.S. Constitution in its 200th year. Over a two-year period, the project sponsored eight public assemblies in three states and the preparation of this reader. Both endeavors are fitting contributions to the national observance of the 200th anniversary of the signing of the U.S. Constitution.

The project has also been a fitting undertaking of the Vinson Institute's Governmental Education Division, which was formed for the purpose of improving citizen education on the principles, practices, and issues of government. The Constitution 200 Project became an integral part of the Division's outreach and service program to the people of Georgia and the Southeast, and indeed the nation.

The assemblies initiated observance and celebration of the bicentennial, not only in Georgia, but in the neighboring states of Alabama and South Carolina. More than 800 people attended the eight assemblies, which were launched in Decatur, Georgia, moving on to Columbia, South Carolina; Savannah, Georgia; Montgomery, Alabama; Athens, Georgia; Tuscaloosa, Alabama; Charleston, South Carolina; and concluding in Atlanta, Georgia.

The director of the Constitution 200 Project and editor of this book is Dr. Mary A. Hepburn, professor of social science education and administrator of the Governmental Education Division of the Vinson Institute. Professor Hepburn has authored numerous articles reporting research on civic education and has written several books, including *Democratic Education in Schools and Classrooms*, published by the National Council for the

Social Studies, and *Local Government in Georgia*, published by the Vinson Institute.

A recent award to the Constitution 200 Project recognized its success in generating public interest in the Constitution. In May 1987, the project and its director received a commendation from the Bicentennial Leadership Project for "contributing significantly to the commemoration of the Bicentennial of the United States Constitution and the Bill of Rights."

The Carl Vinson Institute of Government takes pride in its role in the Constitution 200 Project and in promoting a better understanding of the constitutional underpinnings of our democracy. We look to readers of *Constitution 200: A Bicentennial Collection of Essays* to continue the discussion and study of the Constitution.

January 1988

Melvin B. Hill, Jr.
Director
Carl Vinson Institute of Government

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Preface

The U.S. Constitution has provided a briefly stated, carefully crafted framework for the 200 years of our government. In its brevity and design lies its genius, its power, and its adaptability. James Madison foresaw the power and longevity of the Constitution when he commented in 1787 that "the government we mean to erect is intended to last for all ages." Midway into the nineteenth century, Henry Clay stood up in the Senate and attested to its endurance. "The Constitution of the United States," he said, "was made not merely for the generation that then existed but for posterity—unlimited, undefined, endless, perpetual posterity." The 200th anniversary of the writing, signing, and ratification of the Constitution and Bill of Rights gives us the opportunity during 1987-91 to reexamine our long-enduring charter and how it has developed over two centuries.

Constitution 200: A Bicentennial Collection of Essays evolved from eight public assemblies held in communities in the Southeast. Publication of this book represents the completion of the Constitution 200 Project by the Governmental Education Division of the Carl Vinson Institute of Government. The purpose of the project, supported by a grant from the National Endowment for the Humanities public humanities program, was to initiate public awareness of the bicentennial of our national charter and kindle public reflection on the principles and enduring issues of the Constitution and Bill of Rights.

The essays in this book were presented and distributed at assemblies for the general public, organized and conducted by the Constitution 200 Project over a two-year period in Georgia, Alabama, and South Carolina. In Alabama, our staff was assisted by the Alabama Law Institute of the University of Alabama, and in South Carolina, by the Bureau of Governmental Research of the University of South Carolina and the Commission on the Bicentennial of the U.S. Constitution of the City of Charleston. Their help was greatly appreciated.

Constitutional scholars wrote these essays to provide background information, analysis, and viewpoints for discussion. Each assembly focused on a different constitutional issue, but all followed a similar format. First, a summary of the essay was presented orally by the author. A panel of local citizens representing a broad range of community groups then responded

to the essay, offering individual perspectives on the topic. The meetings concluded with an informal reception encouraging discussion and interaction among the panel members, essay author, and attending public. Participants received a specially printed commemorative copy of the Constitution. These public meetings brought together people from all walks of life in conversation about the Constitution.

This book is intended to expand the dialogue on the Constitution initiated in the public assemblies and elsewhere during this bicentennial observance. The eight essays have been edited and organized into a reader that includes photos, suggested readings, summaries of court cases, and questions for discussion. The red, white, and blue cover is based on the banners designed for the project and displayed at each assembly. The readings are meant to evoke thinking about constitutional questions in many groups—high school classes, civic organizations, club study groups, senior citizen programs, library reading groups, and teacher education programs.

Former Chief Justice Warren Burger, chairman of the U.S. Bicentennial Commission, recommends that "we can best honor our Constitution by giving ourselves a civic and history lesson on its origin and meaning." This book is offered for just that purpose. People of all interests and ages are invited to read the essays and join in the discussion on the meaning of our Constitution.

Mary A. Hepburn
Director
Constitution 200 Project

Founding Principles

Introduction

The three essays in part one of this reader consider three fundamental principles of the U.S. government shaped by the writers of the Constitution in 1787. These principles—federalism, judicial review, and the separation of powers—are not specifically stated in those terms in the Constitution. Two of these, federalism and the separation of powers, were clearly structured into the document. The third, judicial review, developed directly from judicial powers stated in the Constitution.

Perhaps the most fundamental question that the Framers had to decide was the power relationship between the national government and the states. At the Philadelphia convention, some delegates proposed a nation where the states would hold the greatest power. Others, led by James Madison, argued for a supreme national government with power to overrule the states. The result is a government in which the *Constitution and the laws of the United States which shall be made in persuance thereof. . .shall be the supreme law of the land* (Article VI). It is, however, also a government *in which the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people* (Tenth Amendment). This system of shared power between the federal government and the states has come to be called "federalism." Although clearly stated, this concept leaves room for disagreement regarding the scope of national government power and ultimate sovereignty, implying an ongoing tension between state and federal governments as major public issues arise.

The essay on federalism was written by Michael L. Benedict, professor of history at Ohio State University, who presented a summary of the essay in the public assembly held in the Dock Street Theatre in Charleston, South Carolina, on April 6, 1987. Professor Benedict proposes that the question

of ultimate sovereignty has been answered differently by different groups as it served their political purposes in different periods of our history.

The second essay examines the source and extent of the power of the Supreme Court to review the constitutionality of state and federal acts. The author, Martha I. Morgan, is professor of law in the University of Alabama Law School. She presented her essay at the Law Center of the University of Alabama in Tuscaloosa on March 23, 1987. Professor Morgan reviews the recent debate about the role of the Supreme Court and puts it into the context of key arguments regarding the federal judiciary that have arisen since the writing of Article III at the Constitutional Convention.

The third essay discusses the principle of *separation of powers*, the meaning revealed in the Federalist papers, and its application to the relative power of the executive and legislative branches in foreign affairs. Richard H. Cox, the author, is professor of political science at the State University of New York at Buffalo. His essay was presented in Atlanta, Georgia, in the auditorium of the Atlanta Historical Society on May 19, 1987. Professor Cox opens his paper with a discussion of the Iran-Contra affair and how it has focused public attention on the age-old tension between executive and legislative branches in the area of foreign affairs. He follows with an analysis of the requirements and limitations of presidential power as discussed in several essays of the Federalist papers. Thus a current controversy is placed in the context of a debate on the U.S. Constitution, dating back to 1787.

ESSAY ONE

Sovereign Nation or Sovereign States: Federalism through the Civil War Era

By Michael L. Benedict

Introduction

In the United States, we live under a *federal* system of government; that is, a system in which governmental powers are divided between national and state authorities. Systems where final authority is vested in a central government to which local governments are subordinate are called *unitary* governments. There are many varieties of federal government in the world. They range from loose confederacies, where the central government is weak and most authority remains with local governments, such as Switzerland, to nations where the central government is so strong that local governments are almost completely under their control, such as India.

The United States was the first modern nation to create a system in which sovereign power was divided between two governments. Before the 1787 Constitutional Convention in Philadelphia, sovereignty was defined as the supreme authority in a political community, beyond the control of any other power. The accepted idea was that such final authority could not be divided, because there cannot be two supreme powers in a state. People

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Federalism involves more than the division of jurisdiction between two governing authorities.

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conceived a federal system of government to be only a tight alliance of independent states, each of which retained sovereignty. This was the sort of system Americans had established in the Articles of Confederation, the frame of government that united the states before the ratification of the Constitu

tion. In 1787, people generally believed that if sovereignty were transferred to a central government the result would be a unitary nation, not a federal system.

Federalism and Liberty

During the revolutionary era, however, Americans were remarkably willing to defy orthodox understandings of politics and political constraints. In the Constitution of 1787, they divided power by authorizing the government of the United States to act only in particular areas defined by the Constitution, especially in section 8 of Article I. In these areas, such as the regulation of foreign trade, the coining of money, the declaration of war and support of the armed forces, the acts of the central government would be supreme, as provided by Article VI of the Constitution. It was understood that state governments would have final authority in all areas not delegated by the Constitution to the general government, unless they were restrained from acting by their state constitutions. This principle was confirmed in 1791 by public ratification of the Tenth Amendment to the Constitution, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

These constitutional provisions do not provide a very clear line between federal and state jurisdiction. Just what the relations between state and central government should be depends on how one interprets the delegation of power to the government of the United States and how one interprets the Tenth Amendment. Equally important is the question of just who does the final interpreting.

Federalism involves more than the division of jurisdiction between two governing authorities. Federalism is a key element of American *legitimizing rules*. Legal and political philosophers define legitimizing rules as those rules that members of a polity require to be followed when a government promulgates policy. If those rules are not followed, even innocuous legislation, such as the small tax on tea that precipitated the American Revolution, can seem tyrannical. Federalism involves civil liberty because individuals have a *right* to have decisions affecting them made in the forum designated by the legitimizing rules. In the United States's case, that forum is our written Constitution. An American is wronged to whatever extent his or her interests are damaged by public policies that have been decided in a forum other than the one designated by the Constitution. Therefore, controversies over the nature of the federal system involve some aspect of American civil liberty.

The Civil War was America's greatest constitutional conflict. Of course, the underlying cause of that conflict was the existence in the South of slavery,

the spread and permanence of which was intolerable to northerners. White southerners perceived their economic and social institutions, which were inseparable from slavery, to be under attack, and they ultimately reacted by trying to withdraw from the Union. This led to the Civil War. However, southerners rebelled not only because their vital interests were at risk. Their interpretation of the federal system convinced them that northern proposals for national action to limit slavery were illegitimate and thus tyrannical, just as northerners' understanding of federalism convinced them that their proposals were within the authority of the national government and that southern demands were illegitimate. Each side was convinced that *rights* were at stake, rather than mere *interests*. Conflicts of interest can be compromised; matters of right are much more intractable.

Federalism and Antebellum Public Policy

Before the Civil War, several crucial areas of policy depended on which forum—state or national—the Constitution had designated to make decisions about them. The first of these involved economic policy. Would there be a legal environment in the United States conducive to modern economic institutions, especially banks and business corporations? How fixed, stable, and reliable would contracts be? Would governments modify them when they worked hardship on large numbers of people or threatened general prosperity? Would the power of government be harnessed to promote economic development—by subsidizing the expansion of transportation facilities, by establishing government-supported banks, by using the taxing power to impose tariffs to protect American industry from foreign competition, or by encouraging westward migration? These were bitterly disputed questions, because Americans were sharply divided over whether modern commercial development itself was healthy. Even those who supported commercial development disagreed about where and how development should be encouraged, and the outcome of these decisions often hinged on whether the national government or the state government made them.

Similarly, American Indian policy was profoundly affected by the forum making decisions about it. Throughout the nineteenth century, forces sympathetic to native American interests carried greater weight in national councils than in states confronting significant, independent Indian populations. The conflict over which forum would finally determine Indian policy raged bitterly in the 1820s and 1830s. State authorities, especially in the South, insisted that state law and administration extend over Indian populations and land, while native Americans and their sympathizers demanded that the national government enforce treaties that secured Indian autonomy.

Most important was the issue of race and slavery. The great fear among southern whites was that decisions touching slavery would be made in the

national councils, where forces hostile to it would sooner or later prevail. Ironically, many northerners, convinced that slaveowners had seized control of the national government, feared the same thing. Therefore, they also sometimes demanded that state governments retain final decision-making

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Most important was the issue of race and slavery.

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power on slavery-related issues, especially those involving procedures for returning runaway slaves and rules governing visitors who brought slaves to the North temporarily. But, ultimately, antislavery northerners would instead campaign to gain control of the national government themselves.

A nationalist understanding of the federal system not only affected legislative decisions, it permitted federal courts to intervene in state decision making as well. Parties to legal controversies persuaded the federal courts to restrict state authority to regulate relations between debtors and creditors. These parties thus limited state control over corporations and transportation development. They also secured federal court intervention reversing state legislation and state court decisions on land titles. Many nationalists insisted that there was a federal common law that would have justified criminal prosecutions for a wide range of offenses. The federal courts never did accept that argument, but the Supreme Court decided in 1842 that federal judges did *not* have to follow state rules in commercial cases. Since federal court jurisdiction arose whenever a legal dispute between citizens of different states involved more than a nominal sum, the federal courts in effect created a national commercial law and a national forum for resolving commercial disputes as an alternative to state courts and state rules.

Three Antebellum Doctrines of Federalism

In the course of these controversies, Americans developed three different understandings of federalism: (1) state sovereignty, (2) state rights (sometimes called dual federalism), and (3) constitutional nationalism. The first two of these stressed the autonomy of state decision making and too often are not distinguished properly.

State Sovereignty

Central to the doctrine of state sovereignty was the conviction that the individual states became independent, sovereign polities upon throwing off

their allegiance to Great Britain. As independent sovereignties, they agreed first to the Articles of Confederation and then to the Constitution. They saw this as a compact which created a confederacy not a nation. Sovereignty remained in the states; the federal government was merely their agent. Therefore, it was bound to act on behalf of all of them equally when exercising its delegated powers. The compact provided no forum to adjudicate the constitutionality of laws of the United States and of the states when they were in conflict, because the Supreme Court, as part of the subordinate government, could not bind the sovereign states. State courts could ignore federal court decisions that tried to bind them.

By 1830, adherents of state sovereignty insisted that each state retained the final authority to decide such conflicts by nullifying the operation of federal laws within its own boundaries. Finally, if the other parties to the compact sought to enforce a federal law or Court decision over the opposition of the state, the compact would be violated and the state could exercise its sovereign authority to withdraw from the confederacy. It could exercise the same right if the central government failed to fulfill its obligation to promote the interests of all states equally.

State-sovereignty theorists were ambivalent about the scope of federal power. In general, they stressed its limitations. Like adherents of state rights, discussed next, they argued that there was a line separating the jurisdiction of the state governments and the central government. The people of the states had delegated to the United States government both the power to deal with the external affairs of the states, and to regulate relations among them. Final authority over internal matters, however, remained with the states.

This boundary between state and national authority inhered in the fact that the central government had only the powers the states had delegated to it, with the rest retained by the states. Therefore, to maintain state authority it was essential that the delegation of power be strictly construed. But when slaveholders turned to state-sovereignty doctrines to protect their interests, they discovered broad powers in the general government to promote and protect slavery. The obligation of the general government, as agent of the states, to promote state interests equally meant that where federal power existed, it must be exercised vigorously to enforce the property rights of slaveholders.

State Rights (Dual Federalism)

The second state-power oriented theory of federalism—state rights or dual federalism—was similar enough to state sovereignty to allow adherents of both to cooperate in the antebellum Democratic party. But the differences were great enough to split the party during the Nullification Crisis of 1832 and to precipitate the party disruption that led to Lincoln's victory in 1860.

State-rights theorists, too, were hostile to broad construction of the "necessary and proper" clause and denounced the notion that the Constitution delegated to the national government a wide range of "implied powers." But, they recoiled from the idea that the states should have the final say about the constitutionality of federal and state laws, whether by leaving final determination with the state courts or through nullification. They developed a concept of federalism that recognized the national character of the United States government but which treated the national and the state governments as equally sovereign.

The key to the state-rights theory was that the Constitution delegated distinct jurisdictions to the states and to the nation. Whether the people created the Constitution or the states did was immaterial. A portion of the people's sovereign power was delegated to the national government and another portion to the states. The national government was not merely the agent of the states, and the exercise of its powers was not limited to protecting state interests. But the ends towards which each government could exercise its powers were different. There was a line, one might say, between those areas where the power of the national government was supreme and those areas where the state governments were supreme. The national and state governments were equally sovereign, each supreme within its own sphere. The Tenth Amendment provided a constitutional sanction for this arrangement.

This concept of national-state equality had several consequences for the scope of national power. The "necessary and proper" clause must be strictly construed so as to keep the national government within the bounds of the jurisdiction defined by the enumerated powers. Congress and the states each should avoid passing laws that might impinge on the jurisdiction of the other. National and state laws should be interpreted as much as possible to avoid overlap and conflict. Where there was a conflict, however, the Supreme Court, not the states, had the final power to determine the result. It was here that state-rights theory differed most radically from state-sovereignty theory. Between the power of the federal judiciary to protect state rights and the power of the people to substitute new leaders for those who had violated a constitutional trust, there was no justification for nullification or secession.

In umpiring the federal system, dual federalists insisted, the justices must sustain state laws passed in pursuance to the legitimate ends of state government unless they were in plain contravention of national laws passed pursuant to legitimate national ends. Moreover, the national government could not exercise even a delegated power to legislate pursuant to an end outside of those entrusted to the national government by the Constitution. Such a law would violate both the spirit of the Constitution and the Tenth

Amendment. An exercise even of an enumerated power, like that over commerce, could not invade the sovereign jurisdiction of the states over internal policy.

Constitutional Nationalism

The third basic doctrine of federalism was constitutional nationalism. Alexander Hamilton, Supreme Court justices John Marshall and Joseph Story, and Senator Daniel Webster of Massachusetts were among those who insisted that it was the people of the United States as a whole, not the people of the individual states, who had established the Constitution. In his famous reply to the nullification argument presented by South Carolina Senator Robert Y. Hayne, Webster summarized the nationalist perception in 1830: "It is, Sir, the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people. . . . So far as the people have given power to the general government, . . . the government holds of the people, and not of the State governments." Deriving its power from a constitution framed by the people, just as the states did, the United States was not a league or a confederacy. For the purposes enumerated in the Constitution, the American people made up one nation.

Generally, the nationalist conception was that the United States had been created by the Constitution, that is, by compact among the people. But some nationalists argued that the colonial experience and especially the resistance to Britain had welded the people of the 13 colonies into one nation even before they formalized its government through a written document. Of course, such notions strengthened the argument that the people of the United States as a whole, not the people of the individual states, had established the Constitution.

This understanding of the origins of the Union undercut the foundation supporting state-sovereignty arguments for secession, nullification, and the idea that the national government was merely the agent of the states, bound to promote their interests. It seemed equally corrosive to the tenets of dual federalism. Nationality implied that the general government possessed broad, sovereign power, nationalists argued. That was confirmed by the explicit delegation of authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States" in Article I, section 8. The authorization of all laws "necessary and proper" to the execution of national powers meant those laws *appropriate* for fulfilling its obligations. Thus, the powers of the federal government were to be construed broadly. Nationalist arguments supported aid to education, the establishment of a national bank, protective tariffs, and an active program of "internal improvements" designed especially to develop the American transportation system.

Twentieth-century nationalism differs from state rights, or dual federalism, primarily over the dual-federalist notion that the Tenth Amendment reserves to the states an area of sovereign jurisdiction even against powers

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Antebellum nationalists stressed that the federal government needed ample power to accomplish the ends for which it was instituted.

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delegated to national government. Twentieth-century nationalists deny that the Tenth Amendment can restrain federal use of delegated powers. Powers delegated to the national government, whether expressly or by implication, are "plenary" and "absolute," they insist. So, to modern nationalists there is no fixed line separating national from state jurisdiction, no need to avoid overlap. Simply put, state sovereignty begins only where national sovereignty ends.

The 55-mile-per-hour speed limit was imposed in 1974 by a federal mandate requiring that federal highway funds be reduced for states not setting this speed limit.

Most modern commentators assume that the nationalism of Hamilton and Marshall corresponded to the modern concept of constitutional nationalism. But antebellum nationalists stressed that the federal government needed ample power to accomplish *the ends for which it was instituted.* In *McCulloch v. Maryland* (1819), the most celebrated enunciation of nationalist constitutional theory, Marshall wrote, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end. . .are constitutional." Modern nationalists argue that delegated powers may be used to achieve *any* end, and they have utilized them to create a national police power. The modern version of Marshall's rule would read more like: "Let the means be legitimate, let them be within the scope of the Constitution, and all ends which are achieved by those means are constitutional."

Marshall made it clear that the constitutionality of legislation depended "on its being the natural, direct, and appropriate means, or the known and usual means, for the execution of the given power." Marshall regularly defined the powers of the national government in terms of their purpose, deducing their constitutionality from the postulate that "in America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." That dual federalist language could have appeared in any state-rights discussion.

Despite the dual-federalist tinge to Marshall's nationalism, much of the legislation sustained by nationalist arguments did have the appearance of achieving undelegated ends through delegated means. And Justice Story dismissed the Tenth Amendment in language as forceful as that of modern nationalists: "The attempts. . .to force upon this language an abridging, or restricting influence, are utterly unfounded," he insisted. But despite such expansive rhetoric, nationalists often lapsed into the language of dual federalism, assuming some fixed line beyond which the national government could not exercise authority. For example, Webster admitted the necessity for keeping "the general government and the State government each in its proper sphere."

Even Story occasionally sounded like a dual federalist. He delivered one of the most clearly dual-federalist opinions to emanate from the antebellum Supreme Court in *Prigg v. Pennsylvania* (1842), where he drew a strict line between the law-enforcement authority of the federal and state governments and held the national government powerless to impose duties on state officials to enforce national laws. And, although he generally argued that Congress could use delegated powers any way it saw fit, he still conceded inconsistently in his *Commentaries* "that powers given for one pur-

pose, may not be perverted to purposes wholly opposite, or beside its legitimate scope."

In sum, before the Civil War most Americans did not perceive that a reserved area of state jurisdiction was inherently incompatible with nationalist constitutionalism. Prewar nationalism corresponded to what we would now consider a nationalistic form of state rights.

Federalism and the Conflict over Slavery

State Sovereignty and Slavery

Of course, the various understandings of federalism were intimately connected to the conflict over slavery. John C. Calhoun and other aggressive defenders of slavery had fashioned much of the state sovereignty theory. As the agent of the states, the general government was bound to protect the property of all its citizens wherever it had the authority to do so. Therefore, the central government was bound to protect slaveholders' property rights in the federal territories and in Washington, D.C. Congress was required to provide for the recovery of runaway slaves, even though the language of the Constitution seemed to impose that responsibility upon the individual states rather than on the federal government. Congress' power to regulate interstate and foreign commerce and to deliver the mail could be used only to promote and never to diminish the interests of the people of the slaveholding states. Slavery was one of the interests to be protected by American foreign policy. Indeed, the mutual obligations inherent in the compact among the states required that they suppress agitation aimed at subverting the institutions of their sister states.

Constitutional Nationalism and Slavery

Nationalism, on the other hand, suggested a range of actions the national government might take against slavery. Since the national government was sovereign wherever the Constitution had delegated power to it, Congress could make any rule it wanted relative to slavery in the territories or Washington, D.C. Antislavery forces urged Congress to abolish slavery both in Washington and in the territories, and by the late 1840s the latter proposal had won wide support throughout the North. Ultimately, the Republican party swept the North largely on the promise to stop the expansion of slavery into the territories, but all knew that the party would come under pressure from antislavery constituents to extend the ban to Washington and to take further action as well. Nationalist interpretations of federal power would sustain steps to protect the circulation of antislavery materials in the southern mails. Antislavery people argued that Congress' power to admit new states

to the Union implied a power to require abolition as a condition for entrance. They argued that Congress' interstate commerce power would justify a ban on the interstate slave trade. The boldest antislavery people dreamed of a federal law to enforce the right of citizens of one state to the privileges and immunities of citizens in other states, as promised by Article VI, section 2, of the Constitution. That would mean federal protection for antislavery supporters spreading the word to the South.

State Rights and Slavery

The tenets of state-rights theory also could be harnessed to antislavery purposes. The antislavery slogan "Freedom national, slavery local" conceded an area of reserved state jurisdiction in which slavery could be sustained by state law. But on the national side of the line dividing national from state powers, freedom must be the rule. Proponents of state rights could well hold that the power expressly delegated to the national government to govern the territories included the power to ban slavery. Thus adherents of state-rights theory as well as nationalism could unite on the key plank of the Republican platform.

However, state-rights theory also provided strong arguments for Americans who sought to avoid or defuse the slavery controversy. By positing a strict separation between the spheres of state and national authority and by defining slavery to be within the state sphere, state righters could argue that northerners bore no responsibility for the institution at the same time they reassured southerners that the national government retained no power over it.

But what of national power over the District of Columbia and the territories? Surely that implicated the national government, and thus all Americans, in the sin of slavery. Leading Democrats, desperate to find some common ground between their party's northern and southern wings, found a solution in the dual federalist doctrine of "popular sovereignty." By that doctrine, the people of the territories (and the same argument applied to the District of Columbia) had the same right to domestic self-government as the people of the states. With the exception of the power to establish the forms of territorial government itself, Congress had no more power over the domestic institutions of the territories than it had over those of the states. Like state-rights theory in general, this application of it to the territories permitted northern Democrats to reassure their constituents that they were free of responsibility.

A "Correct" Doctrine of Federalism before the Civil War?

People often assume, especially outside the South, that constitutional nationalism was the accepted pre-Civil War understanding of federalism and

that state rights and state sovereignty were merely deviations. But that is not really so. In practice, it was the states that were dominant in the federal system. In almost every area of life, the states were the effective policymakers in the antebellum United States. Not only did the states exercise power, but after the Democratic party took control of the national government, it repealed those programs most clearly identified with nationalism. Constitutional issues were a major part of the political debates of the 1830s through the 1850s, and, it may be said, Americans voted their preference for state rights and state sovereignty.

In terms of formal authority too, nationalism was no longer ascendant after the 1830s. Marshall's court itself began to waver in the face of vigorous state-rights and state-sovereignty opposition in the late 1820s and 1830s. Democratic success made Roger Taney, a dual federalist, chief justice. At least 12 of the 16 justices who served with him from 1835 to 1860 were Democratic devotees either of dual federalism or state sovereignty. Despite some nationalistic decisions, the Taney court was characterized primarily by dual federalism, regularly employing language that suggested a clear division of authority between the state and national governments.

Likewise, there was both formal and practical support for state-sovereignty concepts of federalism. The exercise of the sovereign authority of the state in defiance of national law had been successful in important

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In practice, it was the states that were dominant in the federal system. . . in the antebellum United States.

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instances. The most clear-cut victory for state sovereignty was Georgia's successful defiance of the Supreme Court in the Cherokee Indian controversy of the 1820s and 1830s. In that conflict, the Court had been unable to force the state to obey its decisions defending Indian autonomy from state encroachment. Similarly, for 30 years prior to the war, South Carolina was able to prevent the introduction of federal proceedings in the federal district courts on behalf of black seamen, who by state law were forbidden from debarking in the state.

While South Carolina secured no formal support from other states during the Nullification Crisis, the practical consequence was a reduction in the tariff the state had opposed. Likewise, threats of southern secession in 1850 forced the North to back down from the Wilmot Proviso, which would have banned slavery from territories conquered in the Mexican War. Moreover,

the general antebellum state-centeredness that provided an environment conducive to dual federalism was equally hospitable to notions of state sovereignty, and indeed when the southern states did secede, the vast majority of white southerners decided that in a final conflict they owed their primary allegiance to the state rather than the nation.

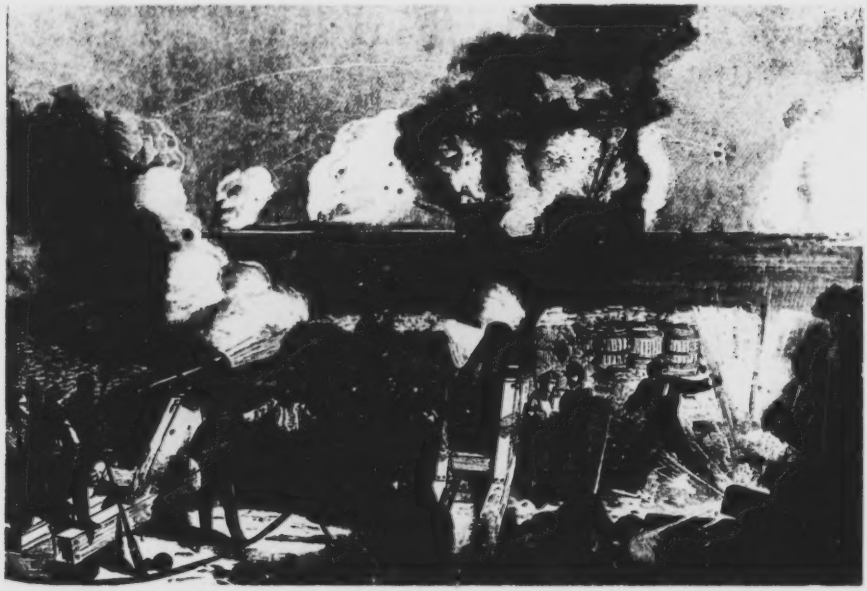
Even in law, there was significant formal support for state sovereignty. The doctrine of state sovereignty was widely articulated in state courts. Most significantly, a key state-sovereignty doctrine seemed to receive the sanction of the Supreme Court in the *Dred Scott* decision. The territories of the United States were held in trust for the people of all the states, the Court held. The federal government was obligated to secure the property of all there equally.

The *Dred Scott* decision confirmed the conviction of southern adherents of state sovereignty that theirs was the correct understanding of the federal system. Thus armed, after 1857 they insisted that Congress pass a slave code for all the territories. In the Democratic national convention of 1860, they demanded that the platform commit the party to that position. In effect, in 1857 state-sovereignty Democrats declared war on state-rights Democrats over which doctrine applied to the territories. The result was the disruption of the Democratic party and the victory in the presidential election of Abraham Lincoln and the Republican party.

When white southerners seceded, formally justifying their action on state-sovereignty principles, northern Democrats rallied to the flag. In doing so, they not only demonstrated patriotism, they acted on their understanding of the federal system—a state-centered doctrine, to be sure, but one which insisted that the United States was a sovereign nation and which rejected the legitimacy of nullification and secession. The Civil War, in other words, was not only a war between the doctrines of state sovereignty and nationalism; it was a war between state sovereignty and state rights as well.

The Civil War, Reconstruction, and Federalism

The slavery issue brought Lincoln and the Republicans to power, and the war secured an overwhelming Republican political predominance for about 15 years. But it did not mark the triumph of constitutional nationalism, as is often claimed. During the war, Republicans in Congress did seem to ignore state-rights principles of federalism. In creating a national banking system, they repudiated dual-federalist limitations upon the national taxing power, utilizing it to suppress state-chartered banks. They used the delegated power to dispose of federal lands to support education and subsidize internal improvements. They used the postal power to subsidize the building



Fort Sumter, in the harbor of Charleston, S.C., was a symbol of federal control to the Confederates. On April 12, 1861, Confederate cannons fired on the fort until the walls began to crumble and the Union troops were forced to leave.

and maintenance of roads and steamship lines. Under the war power, they justified confiscation of property, emancipation of slaves, construction and operation of railroads and telegraphs, and the direct supervision and care of large populations.

The Civil War discredited state sovereignty, ever after associated with treason and slavery. Both the belief that the people, rather than the states, created the Constitution and the idea that a nation underlay the Constitution itself became widely accepted. These ideas were best reflected in the words of Lincoln. In the Gettysburg Address, Lincoln articulated the essence of antebellum nationalism's answer to state sovereignty. The United States was not a league, nor was it created by constitutional compact. Rather, "four score and seven years ago"—in 1776—"our fathers created a new *nation*." The states neither created it, nor was it their agent. It was a government "of the people, by the people, for the people."

But despite the breadth of Republicans' Civil War nationalism, the Civil War did not establish constitutional nationalism as the accepted doctrine

of federalism. State-rights doctrine does not depend on the conception of the Constitution as a compact among the states. No matter who created the Constitution, adherents of dual federalism can point to the Tenth Amendment as the guarantee of state rights. The continued vitality of dual federalism was manifest in the widespread and bitter denunciation of Republicans' use of national power during the war. More significantly, Republicans themselves wavered as the potential of their policies to alter fundamentally the balance of federalism became clear.

Most Republicans reconciled the revolutionary wartime use of national power with traditional American federalism by stressing the temporary nature of the war powers. As Lincoln explained, "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through preservation of the nation." By justifying national action as outside the Constitution, or as exercises of the war power, Republicans believed they had saved the peacetime Constitution

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[Lincoln] eschewed using constitutional power directly to impose or even define the terms of state constitutions or laws.

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from contamination. With war's end, they hoped they could return "to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves."

For nationalists this meant returning, not to the crabbed constitutionalism of Democratic state rights, but to the nationalist constitutionalism of Marshall, Clay, and Webster. They wanted a capacious view of national power, but they could not shake off the notion that there must be some line the federal government could not cross.

One can see these commitments in Lincoln's handling of Reconstruction. As commander-in-chief, he could provide for temporary military governance of Confederate state territory. He could emancipate slaves as a military measure. He could combine the threat of enforcement of confiscation laws with the promise of amnesty to encourage southerners to resume their national allegiance. But, he could not directly organize state governments; he could not order the incorporation of abolition into the state constitutions. He could only invite southerners to take oaths of allegiance and reorganize their own governments. If he felt their constitutions did not comport with freedom, as commander-in-chief he might continue to hold southerners in the grasp of military power. But he eschewed using consti-

tutional power directly to impose or even define the terms of state constitutions or laws.

When Republicans claimed such power for Congress and passed the Wade-Davis Reconstruction Bill pursuant to it, Lincoln refused to sign, killing the measure with a "pocket veto." Despite this disagreement, on the whole congressional Republicans proceeded on much the same theory, claiming the same power as the president to hold southerners in the grasp of war until they "voluntarily" erected state governments dedicated to freedom.

The Republican commitment to what constitutional historians have called "state-rights nationalism" was manifest also in the program through which they sought to enable the national government to protect civil and political rights. In the Thirteenth, Fourteenth, and Fifteenth amendments, Republicans made clear that they were delegating broad power to the national government to secure freedom. The amendments authorized Congress to make all laws "appropriate" for assuring that the states did not deny civil and political rights, thus writing the nationalist definition of "necessary and proper" into the amendments themselves. Nonetheless, Republicans carefully left primary authority to protect persons and property with the states, authorizing the national government to act only when they failed to fulfill their responsibilities.

The Supreme Court joined in this effort to preserve the balance of the federal system. In *Texas v. White* (1869), Republican Chief Justice Salmon P. Chase, in one of the Court's most memorable phrases, announced that the Civil War had preserved "an indestructible Union, composed of indestructible States." In 1871, the Court ruled in *Collector v. Day* that Congress could not impose income taxes on state officials, even though the Constitution delegated the power to levy taxes to Congress, because to do so would impose on the independent sovereignty of the state. In the *Slaughterhouse Cases* (1873), the Court ruled that the rights of state and national citizenship were distinct and that the Fourteenth Amendment only brought the latter under national protection.

When white southerners refused to acquiesce to the policies of Reconstruction, Americans had to face the question of how far they were willing to compromise the traditional balance of federalism in order to protect citizens' rights. Republican governments in the South proved unable to protect their own citizens from outrages committed by the Ku Klux Klan and other terrorist organizations, or to keep peace during election campaigns. Republicans responded by passing several Enforcement Acts making it a criminal offense to conspire to deprive American citizens of their civil or political rights. In 1871, President Ulysses S. Grant suspended the privilege of the writ of *habeas corpus* in several counties where the Klan was strong,

permitting United States law enforcement officers, aided by the army, to jail suspects before trial. To many Americans, it seemed that the national government was undertaking obligations at the heart of state jurisdiction, virtually establishing a federal criminal code to protect citizen against citizen.

At the same time, election violence in the South forced the president to send troops to keep order. Opponents charged, unfairly but effectively, that they were used to intimidate Democratic voters and keep Republicans in office. Disorder got so bad during elections that in several southern states, both Republican and Democratic gubernatorial and state legislative candidates claimed victory. In such cases, Democrats were able to muster more force than the Republican state governments, and again President Grant had to intervene to prevent violence. He ended up deciding which candidate would take office, and although he tried to be fair, his actions were seen by many Americans as extreme national intervention in state affairs.

Ultimately, the continuing commitment among Americans to the notion that there was some residuum of state sovereign jurisdiction proved the undoing of Reconstruction and national efforts to protect citizens' rights in the South. Many Americans simply could not tolerate a federal system in which national district attorneys, marshalls, and troops undertook the responsibilities of state officials, and where the president of the United States regularly decided who would serve as governors and legislators in sovereign states. By the mid-1870s, enough northern voters had come to oppose Republican southern policies to swing elections to the Democratic party. As a consequence, the Republican party backed away from its active defense of civil and political rights in the South. It may be said that once again Americans had voted their preference for state rights over more modern constitutional nationalism.

Conclusion

As of the 1870s and 1880s, both constitutional nationalism and state rights remained viable theories of federalism. Most Americans seem to have been attracted to both doctrines at different times and on different issues, and each doctrine was influenced by the other. Nationalists seemed to perceive a limit, a line beyond which the national government could not extend even delegated powers. Proponents of state rights, on the other hand, seemed to concede a larger area of nationalist jurisdiction than they had before the Civil War.

By saving the Union, by securing political power to those who wanted to create a national economic market, by promoting the nationalization of a variety of American institutions, the Civil War created an environment in which the triumph of modern nationalism may have been inevitable. But

having rejected state sovereignty, Americans remained committed to state rights until the realities of a national economy and a fundamentally national society led to the still challenged dominance of nationalist doctrines of federalism in the twentieth century.

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SUMMARIES OF CASES

McCulloch v. Maryland, 4 Wheaton 316 (1819).

The state of Maryland imposed a heavy tax on the Baltimore branch of the Bank of the United States, which was chartered by the national government. The chief cashier, McCulloch, refused to pay, arguing the tax was unconstitutional because it was in conflict with the national law authorizing the bank to operate. The state argued that the federal law chartering the bank exceeded the powers delegated to the national government by the Constitution. Even if the charter were constitutional, the states had an absolute right to levy taxes within their borders. The Supreme Court ruled that the "necessary and proper clause" of the Constitution (Article I, section 8) authorized the national government to pass any legislation appropriate to carry out powers expressly enumerated in the Constitution. It held further that states could not tax instrumentalities of the federal government, because a state power to tax them implied a power to destroy them through taxation.

Prigg v. Pennsylvania, 16 Peters 539 (1842).

Prigg went to a Pennsylvania state magistrate to get authorization to take an alleged runaway slave back to Maryland, according to the federal Fugitive Slave Act. The magistrate refused to cooperate and Prigg took the alleged runaway to Maryland without legal authorization. Pennsylvania charged him with violating Pennsylvania's laws governing the return of fugitive slaves. Prigg responded that Pennsylvania's laws on the subject were unconstitutional. The Supreme Court agreed, holding that the fugitive slave clause of the Constitution (Article VI, section 2) withdrew all authority over the question from the states, permitting slaveowners to recapture alleged runaways regardless of state laws. The clause also authorized the national government to pass laws to aid in such recaptures. However, the national government could not impose upon state officials the obligation to help enforce the law.

Dred Scott v. Sandford, 19 Howard 393 (1857).

Dred Scott, a resident of Missouri, sued his owner, a resident of New York, for his freedom, arguing he had been automatically emancipated by living with his deceased former owner in the free state of Illinois and the free territory of Wisconsin. The majority of the Supreme Court ruled that Scott lacked standing to sue in the federal courts, because citizenship of the United States and of the individual states were separate and distinct. No black person was a citizen of the United States, even if he were a citizen of the state in which he resided. The majority also ruled that the refusal of the state of Missouri to recognize an emancipation in Illinois was dispositive of that issue. Finally, the majority ruled that Scott was not freed by living in Wisconsin territory, because Congress could not prohibit slavery in national territories and that the law doing so in Wisconsin was unconstitutional.

Texas v. White, 7 Wallace 700 (1869).

Texas sued for an injunction to prevent persons who had received United States bonds from the Confederate Texas government from collecting interest upon them. The respondents denied that Texas, as yet unrestored to normal relations in the Union, had a state government and that it therefore was not entitled to sue in the federal courts. The Supreme Court rejected the argument, holding that the states were an essential, indestructible element of the American governmental system.

Collector v. Day, 11 Wallace 113 (1871).

Day refused to pay federal income tax on his salary as a state judge, arguing that a federal power to tax the income of state officials implied a power to destroy state instrumentalities through taxation of them and thus violated the separate sovereignty of the states. The Supreme Court agreed that Congress could not constitutionally levy taxes on the incomes of state officials.

The Slaughterhouse Cases, 16 Wallace 36 (1873).

Louisiana required all butchers in the city of New Orleans to carry on their trade in a single slaughterhouse, authorized to be built by a specified corpora-

tion. The butchers claimed that this law deprived them of the privileges and immunities of citizens of the United States, in violation of the first section of the Fourteenth Amendment, by limiting their right to follow their occupation freely. The majority of the Supreme Court justices held that the law did not violate the Fourteenth Amendment, because the privileges and immunities of citizens of the United States were only such rights as grew out of national citizenship, as distinct from fundamental rights, which were associated with state citizenship.

QUESTIONS FOR DISCUSSION

1. How does the author explain the connection between federalism and liberty? or indivjdual rights?
2. Before the Civil War, what important issues were tied to questions of state or federal determination?
3. Explain the differences in the three views of federalism that developed in the antebellum period: (1) state sovereignty, (2) state rights (or dual federalism), and (3) constitutional nationalism.
4. What was the reaction to slavery of each of these groups?
5. What were the effects of the Civil War and Lincoln's Republican administration on the acceptance of each of the three views of federalism?

ESSAY TWO

Judicial Review and the Role of the Supreme Court

By Martha I. Morgan

Introduction

As we celebrate the bicentennial of the United States Constitution, the recurring debate over what the Constitution means and how the courts should interpret it has begun anew. Attorney General Edwin Meese III sparked this new round of debate by calling for the Supreme Court to "resurrect the original meaning of constitutional provisions as the only reliable guide to judgment." He has sharply criticized recent Supreme Court decisions, accusing the Court of infidelity to the "intent of the framers" of the Constitution.

Supreme Court Justice William J. Brennan, Jr., has publicly responded to Meese's criticisms. Justice Brennan has defended the Court's interpretation of the Constitution:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.[1]

Press accounts have labeled this controversy the "Meese-Brennan debate" and have portrayed the issue as a clash between the "liberalism" of Justice Brennan and the "conservatism" of Attorney General Meese. However, the issues being debated are not new and the opposing views are not inherently tied to particular political positions. At different times, liberals

have attacked the Supreme Court for overstepping its bounds, and conservatives have sprung to its defense, and vice versa.

The current arguments should be placed in context as a part of a larger debate over the legitimacy of the Supreme Court's role in our constitutional system. The principle of judicial review—the tenet that the Supreme Court has the power and duty to review the constitutionality of state and federal acts—has been an accepted part of our constitutional framework since 1803. Yet, critics have repeatedly argued that there are fundamental problems with ceding such vast power to the federal judiciary. Arguments over the legitimacy and extent of judicial review have led to attempts to impose limits or constraints on how the Court exercises power. The Meese-Brennan debate is one part of this continuing debate over appropriate limits or constraints.

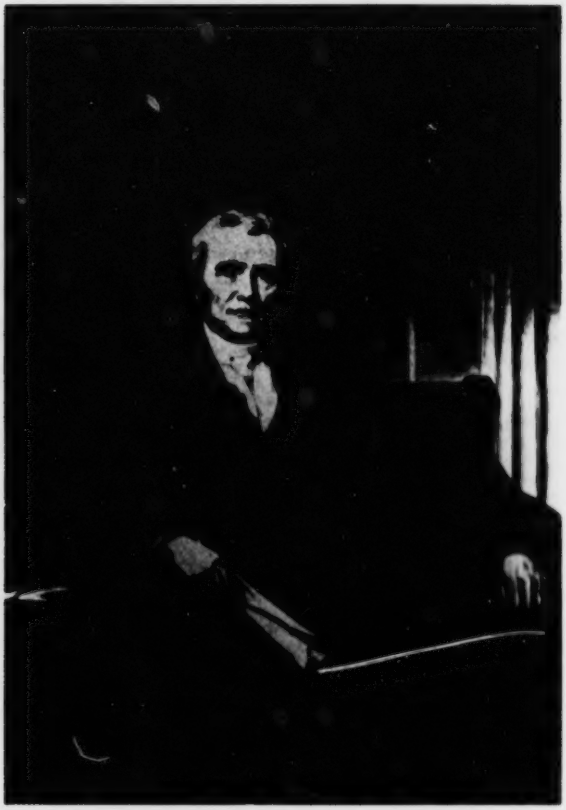
To better understand the Meese-Brennan debate, we must examine more closely the principle of judicial review, the perceived problems with judicial review, and the attempts to impose limits on this power.

The Principle of Judicial Review

Marbury v. Madison and Its Progeny

Chief Justice John Marshall wrote the opinion for the unanimous Supreme Court in the 1803 case, *Marbury v. Madison*, which established the principle of judicial review. Marshall concluded that the Supreme Court has the power to review acts of the federal executive and legislative branches, and that judicial review includes the power and duty to declare void acts of Congress which the Court finds to be inconsistent with the Constitution. Marshall boldly asserted that it is "emphatically the province and duty of the judicial department to say what the law is." He supported the Court's conclusion that it has such power by pointing to the nature and structure of the Constitution as written fundamental law designed to limit the powers of government. If legislative acts contrary to the Constitution are not void, Marshall reasoned, "then written constitutions are absurd attempts on the part of people to limit a power in its own nature illimitable." And, if the judiciary is to fulfill its duty of saying what the law is, it "must of necessity expound and interpret the law." In cases of conflict between the Constitution as paramount law and an act of Congress, the Constitution, as interpreted by the Supreme Court, must govern.

While the text of the Constitution does not expressly state that the Supreme Court has this power of judicial review, Marshall's opinion pointed to three clauses in the Constitution that furnished additional arguments for judicial review: (1) the grant of judicial power over all cases arising under the Constitution, (2) the requirement that judges take an oath to support



Chief Justice John Marshall wrote the Supreme Court opinion in the Marbury v. Madison *case in 1803, establishing the principle of judicial review.*

the Constitution, and (3) the declaration in Article III that the Constitution will be the supreme law of the land and that only those laws of the United States made in pursuance of the Constitution shall have that status.

Following the decision in *Marbury*, the Marshall Court extended the principle of judicial review in a trilogy of cases concerning the Supreme Court's power to review the constitutionality of acts of the several branches of state governments. In 1810, the Court unanimously ruled, in the case of *Fletcher v. Peck*, that an act of the Georgia legislature rescinding a prior fraudulent land grant violated the federal Constitution's guarantee against impairment of contractual obligations. Six years later, in *Martin v. Hunter's Lessee*, the Court ruled that it had the power to review and revise judgments of state courts in cases within the power of the federal judiciary. In 1821, in *Cohens v. Virginia*, the Court reaffirmed its power to review judgments

of state courts, extending the power to include review of state court judgments in criminal cases.

By the time of Marshall's death in 1835, the principle of judicial review was firmly established. We should not lose sight, however, of the highly political context in which the principle emerged and was nurtured by the Marshall Court. John Marshall was appointed to the Supreme Court in

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So well did Marshall play his role that the principle of judicial review has become a "fixed star in our constitutional constellation."

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the closing hours of the Federalist administration of President John Adams, just one month before Adams' Republican successor, Thomas Jefferson, took office. The Federalists, having lost control of the executive and legislative branches, turned to the federal judiciary as their last hope for maintaining some power in the government of the Union. Shortly before handing over the legislative and executive reins, the Federalists enacted sweeping judicial reforms, including reducing the number of Supreme Court justices from six to five in an effort to maintain long-term control over the life-tenured branch of the government. As chief justice, John Marshall faithfully fulfilled the mandate to establish the federal judiciary as a powerful institution, capable of protecting Federalist interests against the feared "excesses" of the popular will represented by the Republicans.

So well did Marshall play his role that the principle of judicial review has become a "fixed star in our constitutional constellation." This is not to say it has never been challenged, however. In 1958, Arkansas flouted the principle of the supremacy of the federal judiciary by refusing to comply with federal court orders to desegregate public schools. In *Cooper v. Aaron* (1958), the Supreme Court responded, emphatically declaring that the interpretation of the equal protection clause in *Brown v. Board of Education of Topeka* (1954) is the supreme law of the land and is binding on the states.

Problems with Judicial Review

To demonstrate that the principle of judicial review has long-standing acceptance is not to suggest that it has escaped criticism. Most criticisms focus on three problems:

- lack of specifically stated support for the exercise of judicial review in the text of the Constitution

- its countermajoritarian structure, i.e., it is not in the hands of representative, elective bodies
- subjectivity in the judges' decisions

Constitutional Support

One problem with judicial review, some argue, is that there is no stated constitutional provision for Marshall's opinion in *Marbury*, since no part of the text explicitly gives the power of judicial review. Marshall's opinion weaves together arguments about the nature and structure of the Constitution and inferences to be drawn from certain textual provisions. But, some would try to unravel this tapestry and proclaim that the justices are not clothed with the power claimed.

Other critics would not totally defrock the Court of its power of judicial review, but would read the power established in *Marbury* more narrowly than the Court has done. They would argue that the Court has the power to review and declare acts of the other branches unconstitutional when this is necessary in a specific case. This does not mean, however, that the Court's

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. . . some would proclaim. . . that the justices are not clothed with the power claimed.

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opinion in one case is binding on the other branches in future cases. Attorney General Meese seems to advocate this limited reading of *Marbury*. The argument is sometimes cast in terms that attack the *exclusivity* of the Court's role in interpreting the Constitution. Congress and the president have the right and duty, it is argued, to make their own judgments about the meaning of the Constitution.

Arguments attacking the exclusivity of the Court's role in interpreting the Constitution are not new. Thomas Jefferson took an even more limited view of judicial power, arguing that any constitutional ruling of the judiciary bound only the judiciary. In 1804, Jefferson argued that giving judges the right to decide what laws are constitutional, not only for the judiciary, but for the legislative and executive branches also, would make the judiciary a "despotic branch." In 1832, President Andrew Jackson vetoed, on constitutional grounds, an act to recharter the bank of the United States, despite the Supreme Court's earlier opinion that Congress had the power to charter such a bank. "[The] opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that

point the President is independent of both," declared Jackson. And in Abraham Lincoln's first inaugural address, he warned:

> . . .The candid citizen must confess that if the policy of government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judge. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.[2]

Responses

Responses to the problem of constitutional support for judicial review and the issue of the exclusivity of the Court's role in interpreting the Constitution vary. Some argue that Marshall's opinion in *Marbury* does properly interpret the Constitution to place this power in the federal judiciary. Others contend that even if the reasoning in the *Marbury* opinion does not compel acceptance of judicial review, the history surrounding the framing of the Constitution shows that the Framers *expected* the Court to exercise such a power.

Yet others, including most notably the late Judge Learned Hand, have remained unconvinced that the Constitution itself supports the principle of judicial review, but conclude that the Court was right to claim such power because it was a practical necessity. The final word must rest somewhere, Judge Hand argued. For the constitutional venture to succeed, he believed, we could not have branches of government that, although coordinated, are wholly independent.

Pragmatism provides a response to the exclusivity issue as well. The issue is not one of exclusivity at all, but of finality and supremacy. The most fervent supporters of broad judicial review do not deny that the other branches of government are duty bound to make judgments about the constitutionality of matters within their own spheres of action. They maintain, however, that the need for uniformity and the practical necessity that the final word rest *somewhere*, dictate that the other branches are bound by existing authoritative Supreme Court interpretations and cannot disregard these interpretations when acting within their own spheres. Thus, the Supreme Court's role in interpreting the Constitution is not based on a claim of "exclusivity" but of "supremacy" and "finality."

The Countermajoritarian Difficulty

Another issue regarding judicial review, some say, is that it is countermajoritarian. That is, nine justices appointed for life, are given the final power to overrule decisions of the more representative, majoritarian branches of federal and state governments. Thus, the argument goes, judicial review is inconsistent with our democratic principles of government. Some consider it dangerous to our representative political processes. Writing in 1901, noted scholar James Bradley Thayer warned of the "tendency of a common and easy resort to this great function [judicial review] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that."

Responses

Responses to the countermajoritarian question have been several. One has been to point out, as Marshall did in *Marbury*, that the very purpose of judicial review is to enforce the Constitution's limits on legislative and

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. . . judicial review is inconsistent with our democratic principles of government.

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executive power and thus establish certain fundamental principles of law as above, and not subject to, politics.

Another frequent response to the countermajoritarian argument is to attack one or both of the two underlying assumptions of the argument. These are (1) that the Supreme Court is not politically accountable, and (2) that the legislative and executive branches are. Defenders of judicial review point to numerous mechanisms of political control over the Supreme Court, including appointment by the president with the advice and consent of the Senate; impeachment; constitutional amendment; Congressional control over the jurisdiction of the federal judiciary; and the informal political limits imposed by the existing political consensus in society at a particular time.

Others go further and argue that our more representative branches are not totally representative or accountable. The Constitution adopted in 1787 did not establish a pure democracy or even a purely representative democracy. Universal suffrage was not part of the Framers' plan. Not only were women and black men generally excluded from voting, property qualifications kept many white males from voting.

The Founders did claim to have established a republican form of government, but the Anti-Federalists were adamant in their argument that the Con-

stitution was inconsistent with classical republicanism because it severely limited the actual participation of the people in the political processes. In their view, vast powers were given to a president whose term was lengthy and who was eligible (originally) to unlimited reelection and to courts with broad, undefined powers staffed by persons unaccountable to the people. They also argued that the 30,000 population basis for representation in the "representative" House was so large as to belie the label.

Subjectivity

The third commonly cited problem with judicial review is that of subjectivity. Do judges, in interpreting the Constitution, inevitably read their own social, economic, political, and moral views into the Constitution? If so, are we a nation not of laws, but of judges? Chief Justice Marshall was sensitive to this criticism and sought to dispel it. Writing in 1824, in *Osborn v. Bank of the United States*, he said:

> Courts are the mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect . . . to the will of the law.

But, as the importance attached to the president's power to appoint Supreme Court Justices illustrates, no one seriously believes that the will of the judge is irrelevant in interpreting the law. Marshall was stating the classic view that judges are to find and apply the law, not to *make* law. Perhaps few judges would go as far in rejecting that view as did Jeremiah Smith, who after leaving the Supreme Court of New Hampshire in the early 1800s to teach at Harvard Law School, remarked: "Do judges make law? Of course they do. Made some myself." Most probably would agree, however, that the truth lies somewhere between Marshall and Smith. Who the judges are does influence what the law is. And notwithstanding Marshall's formal protestations, the Federalists' strategy to gain control of the federal judiciary in 1801 belies any such naivete on his part.

Responses

Generally, the response to the subjectivity critique of judicial review has not been denial, but the admission of inevitableness and the offer of justifications. Supporters of judicial review point out that no matter who has the last word in interpreting the Constitution, as long as they are human, the subjectivity problem will remain. Nevertheless, that the need for uniformity and the practical necessity of having the final say rest somewhere must be admitted. And, the argument continues, there are good reasons for having it rest with the Supreme Court, favoring the subjectivity of the Court over

the subjectivity of the legislative and executive branches. Here, the supporters of judicial review turn the countermajoritarian concerns on their heads and argue that the Court's independence and insulation from the passions of the political fray are advantages. Supreme court justices have the time, training, and the insulation from everyday affairs "to follow the ways of the scholar in pursuing the ends of government," according to the late scholar, Alexander Bickel. "This is crucial in sorting out the enduring values of a society."

This argument in support of judicial review implicitly rejects the classical republican view that the legislative process is an enlightened discourse about the common good. It adopts the contrary view of *political pluralism*—that the legislative process is a self-interested struggle between competing social and economic groups—and looks to the Court as better able to discern and protect our enduring values.

Interpretive Constraints

Questions concerning the legitimacy of judicial review have not led the Court to abdicate its power to finally "say what the law is." But, the arguments against judicial review have influenced *how* the Court exercises this formidable power. Recognition of the problems with judicial review has led to attempts to establish interpretive limits or constraints on the Court's exercise of judicial review.

The search for constraints to guide the Court in interpreting the Constitution is, in part, a response to the demise of the classical view that judges do not make law, but only find law. This classical view is based on the assumption that meaning is something fixed or determinant that can be found within a text. However, this assumption is now discredited by those who argue that meaning is not something found within a text, but is something made by the reader or interpreter. Under this view, any hope of arriving at some consensus as to the meaning of a text lies in establishing agreed-upon interpretive norms or constraints that reduce the subjectivity and uncertainty inherent in interpretation.

The search for constraints to govern constitutional interpretation has focused on identifying the appropriate sources from which the Court should draw guidance. The possible sources of guidance are numerous and many disagree over which sources are appropriate. Looking at some of these sources and at some examples of how the Court has relied upon them will help place the Meese-Brennan debate in proper perspective. The main sources of constraint or guidance which are offered by jurists and scholars as the basis for interpreting the Constitution are (1) the text, (2) the original intent, (3) structural inferences, (4) practice and precedent, (5) consequences, (6) natural law, and (7) protecting political processes.

Looking to the Text

All agree that the text itself should be looked to in interpreting and applying the Constitution. The language of the document is, after all, a logical starting place. The more difficult question is whether the Court can, or should, stop there. Justice Owen Roberts, in *U.S. v. Butler* (1936), explained the Court's job in exercising its power of judicial review as follows:

> It is sometimes said that the [C]ourt assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. *When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.* All the [C]ourt does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. [emphasis added]

Few, however, would seriously contend that most constitutional questions can be resolved in the mechanical fashion suggested by Justice Roberts' remarks. True, some questions, such as whether a citizen 30 years of age is eligible to run for president, can be answered by reading and applying the text. Such easily resolved questions, however, are not the ones that find their way to the Supreme Court.

The hard questions defy answer by mechanical application of the text. Most issues of constitutionality are not as clear-cut as the age requirement for the presidency. The text is filled with ambiguous and open-ended language. Students of constitutional history quickly learn that the Constitution did not represent a grand meeting of the minds on all the issues so vigorously debated during its drafting and ratification. Rather, many questions were left open for future determination. Imprecise words and phrases were often used with their definition left to the future. For example, the text alone does not answer questions concerning the meaning of "commerce," much less the meaning of phrases such as "due process," "unreasonable searches and seizures," or "cruel and unusual punishment."

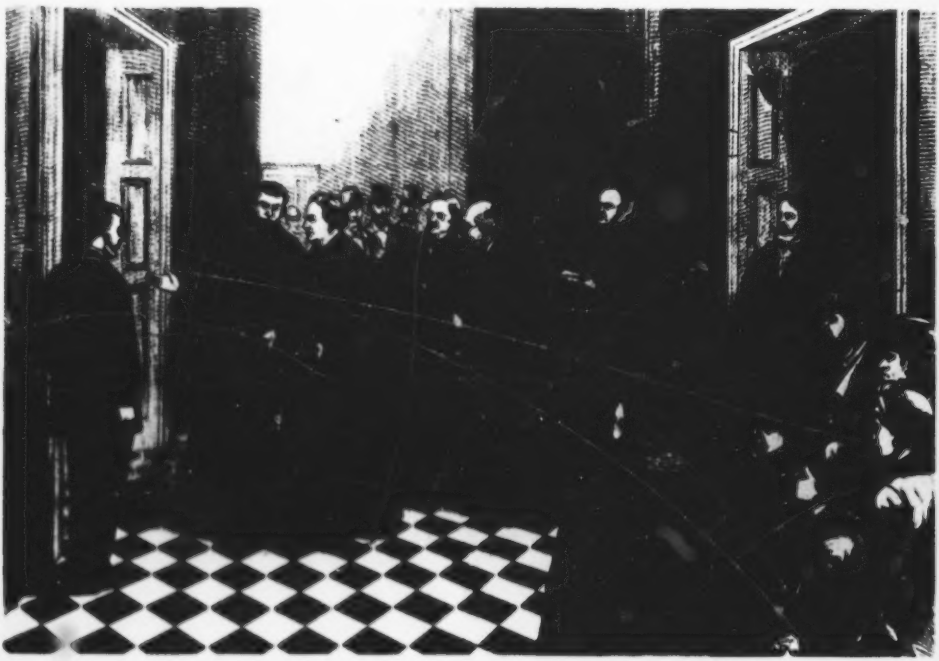
Looking to the Original Intent

As the Meese position illustrates, many argue that questions unanswered by the text of the Constitution can, and should, be resolved by looking to original intent. But "intent" can mean different things, at different times, to different people. For example, in law it is possible to distinguish *objec-*

tive intent, the reasonable presumed intent as reflected by a document, from *subjective intent*, the actual intent of the parties to the document. Are either or both these forms of intent appropriate sources of guidance in interpreting the Constitution?

Objective Intent

Legal scholar Jefferson Powell argues that at least until the 1820s or 1830s, when the term *original intent* was used, it referred to intent in the objective sense of the public meaning of the Constitution and not to intent in the subjective sense of the private meaning that the individuals involved in its drafting and adoption may have ascribed to the document. The notion of looking for the objective intent of a document as evidenced by the language, structure, and purposes of the document was in accord with existing common-law principles of interpretation of statutes and legal documents.



A drawing from the 1880s shows the chief justice and associate justices of the Supreme Court passing to the court chamber from the robing room.

The task of interpreting a written constitution was a new one and common-law interpretive strategies were an obvious source of guidance in how to go about this new endeavor.

An example of the use of *original intent* in this objective sense can be found in Chief Justice Marshall's 1819 opinion in *McCulloch v. Maryland*. Marshall's opinion upheld Congress' creation of the second bank of the United States, despite the absence of an express constitutional grant of such power to Congress. Marshall reasoned:

> . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could be scarcely embraced by the human mind. It would probably never be understood by the public. *Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language* [emphasis added]. . . . In considering this question, then, we must never forget, that it is *a constitution* we are expounding. [emphasis original]

Subjective Intent

In the contemporary debate over original intent, intent is commonly used subjectively to refer to the personal meaning or expectation of the individuals who participated in the drafting and ratification of the Constitution and its amendments. Modern intentionalists such as Attorney General Meese call for historical inquiry into the minds of the Framers to resolve constitutional questions.

Perhaps, as legal scholar Peter Gabel has argued, the fascination with the intent of the Framers is a Freudian or socio-psycho-analytic fixation based on a desire to escape feelings of alienation and return to an earlier, more simple time. Others may embrace the original intent argument because it appears to provide a solution to the problems of subjectivity and indeterminacy discussed earlier. But, close examination of the jurisprudence of original intent as currently advocated reveals numerous problems with the approach. Review of some of these problems shows that, in the end, original intent is itself plagued by subjectivity and indeterminacy.

Whose intent counts? One problem in applying modern original intent doctrine is answering that question. Do we consider the intent of delegates to the Philadelphia convention that drafted the Constitution, or the intent of the delegates to the state conventions that ratified it? And what about

the intent of the opponents whose views shaped the acts and interpretations of the others? Similar questions arise in trying to determine the original intent of Framers of the amendments to the Constitution.

What about conflicting intents? The Constitution was adopted after long and vigorous debate and disagreement. Those who participated in the drafting and ratification frequently held opposing views about the meaning of the new Constitution. For example, Alexander Hamilton strongly supported Congress' power to create the first bank of the United States; James Madison believed Congress lacked any such power under the new Constitution. Later as president, Madison supported the second bank, explaining that the controversy over the first bank had settled the issue.

To the problem of conflicting intents we must add the general difficulty of determining the intent of collective decision-making bodies. The Supreme Court was forced to confront these difficulties in its 1954 decision declaring racial segregation in public schools unconstitutional. After initial arguments in *Brown v. Board of Education*, the Court held the cases over for reargument the following term and asked the parties to address questions concerning the original intent surrounding the adoption of the equal protection clause of the Fourteenth Amendment. Following reargument, the Court admitted that the exercise had been of little value in resolving the issue before it, because the results of the search were inconclusive at best.

What about the Framers' intent regarding original intent? As mentioned earlier, the Framers and early interpreters of the Constitution may not have believed that original intent in the subjective sense was an appropriate interpretive strategy. For example, Madison not only refused to allow his notes on the Philadelphia convention to be made public until after his death, but he also expressly disavowed the relevance of the convention proceedings in answering constitutional questions. If the Framers themselves did not mean for us to look to their intent, is the jurisprudence of original intent hoist by its own petard?

Another aspect of this question concerning the Framers' intent is raised by their use of open-ended and ambiguous language. Is this language evidence

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Is [the Framers'] language evidence that they expected and intended future courts to answer questions purposely left open?

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that they expected and intended future courts to answer questions purposely left open? Again, this argument turns intent upon itself to demonstrate that, on its own terms, the jurisprudence of original intent should be abandoned.

How specific an intent is required? Must the Framers actually have thought about and formed an intent concerning the specific problem facing the Court? If so, then Justice Brennan is right when he says that upholding constitutional claims "only if they are within the specific contemplation of the Framers in effect, establishes a presumption. . .against the claim." It seems clear that the Framers could never have imagined many of the problems the Court faces today. For example, those who framed the First Amendment could not have specifically intended to protect modern media such as television, radio, and motion pictures. But few would argue that the general intent to ensure freedom of expression should *not* be read as affording protection to these newer forms of communication.

A similar problem arises when conditions have changed so that the assumptions underlying the original intent of the Framers are no longer valid. Should courts disregard the Framers' outdated specific intent and rely instead on their general intent to remedy existing evils, inferring an intent to reach similar future evils as well? In *Brown v. Board of Education*, the Supreme Court discussed the problem of dramatically changed conditions. Writing for the Court, Chief Justice Warren explained that one reason for the inconclusive nature of the history of the Fourteenth Amendment in regard to racial segregation in public schools was the status of public education in 1868. There was little public education in the South, and even in the North it did not approach what existed in 1954. Chief Justice Warren concluded:

> In approaching this problem we cannot turn the clock back to 1868 when the Amendment was adopted. . . .We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Finally, what about the intent of those who search for the Framers' intent? While we are quick to see and understand the problem of judicial subjectivity, those of us who are not historians may be blind to the subjectivity and indeterminacy of historical interpretation. Interpreting historical materials is no more exact than interpreting legal texts; historians often offer widely differing interpretations of the same event. Seeking to avoid uncertainty and subjectivity in constitutional interpretation by substituting a historical interpretation of the intent of the Framers is futile. For example, historian James Hutson has recently raised serious questions about the integrity and reliability of the documentary record of the constitutional convention. Thus, even if trusted to the hands of historians, historical interpretation could not deliver certainty and objectivity. Practiced, as it often is, by judges and lawyers without training in historical research, the problems increase exponentially.

In a speech responding to Attorney General Meese's call for a return to original intent, Justice Brennan has described Meese's views as "facile historicism" and little more than "arrogance cloaked as humility." "It is arrogant" he said, "to pretend that, from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."

Structural Inferences

Objective intent, with its emphasis on drawing meaning from the nature and purposes of the Constitution, is a form of structural interpretation. Looking to the structure and relationships of the Constitution in resolving constitutional questions has received the endorsement of many legal scholars. Most notably, legal scholar Charles Black has advocated reasoning from structure to relation, because to succeed it has to make current, practical sense. "The textual-explication method, operating on general language, [contains] within itself no guarantee that it will make sense, for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else."

The doctrine of separation of powers illustrates the Supreme Court's reliance on the structures and relationships set out in the Constitution to resolve constitutional questions. The text of the Constitution nowhere explicitly refers to separation of powers, yet the concept permeates the document's organization of the three branches of the federal government. Accordingly, the Court has applied the doctrine of separation of powers to impose limits on the power of any branch to infringe on the essential functions of the other branches.

Practice and Precedent

Practice

As previously noted, at the time the Constitution was adopted there was a well-developed common-law tradition of canons or rules for interpreting legal documents and statutes. Those faced with the task of interpreting the new Constitution looked to and were influenced by this tradition. One common-law canon of interpretation was that *practice* or usage was relevant to the interpretation of legal texts or documents. If language in a statute or legal document was ambiguous, evidence as to the practice or usage under it could be considered in resolving the ambiguity.

An early example of the Supreme Court's reliance on past practice in resolving a constitutional question is found in *McCulloch v. Maryland* (1819). Marshall's opinion for the Court began consideration of the question of Congress' power to incorporate a bank by reviewing the past practice.

Precedent

Under the existing common-law tradition of legal interpretation in the late eighteenth-century United States, judicial *precedent*, or prior judicial interpretation of a statute, was the most important nontextual source of guidance in future interpretations of the statute. This reliance on precedent likewise found its way into the interpretation of the Constitution.

The Court, however, has been wary of importing a rule of strict *stare decisis* (under which its prior decisions are binding on the Court in future cases) into constitutional interpretation. Citing the differences between statutory interpretation, where legislatures can more easily change judicial interpretations of legislative intent, and constitutional interpretation, where changes can be made only through the process of amending the Constitution, the Court has applied the doctrine of *stare decisis* more flexibly in interpreting the Constitution. For example, in *Brown v. Board of Education* and later cases striking down separate-but-equal laws, the Court refused to be bound by the decision in *Plessy v. Ferguson* (1896) that said such laws did not violate equal protection.

Consequences

A favorite form of legal argument is to support a desired position by pointing to the consequences that would flow from the acceptance of a contrary position. The extreme of this form of argument is sometimes referred to as a "parade of horribles." "Slippery slope" or "Pandora's box" warnings are closely related forms of argument which rely on claims that there will be no stopping point if the Court accepts a particular position. The Court, at times, uses these forms of argument in justifying a particular decision; at other times it dismisses them as largely histrionics.

A less theatrical and more important aspect of reliance on consequences in resolving constitutional questions is the use of evidence from the social sciences and other disciplines to demonstrate the consequences of a particular legal outcome. Before being appointed to the Supreme Court, Louis Brandeis pioneered the practice of "sociological jurisprudence" as he worked with women's organizations in defending the constitutionality of so-called protective labor legislation. In *Muller v. Oregon* (1908), the Supreme Court relied on an abundance of data from Brandeis' 113-page brief containing widespread opinions from nonjudicial sources to uphold an Oregon law prohibiting the employment of women in factories and laundries for more than 10 hours a day. The issue of special treatment for women workers divided the leaders of the women's movement in the early twentieth century, just as it does today. But, there was agreement in the legal community on the effectiveness of the "Brandeis briefs," as they came to be called, and such briefs have become an accepted part of Supreme Court litigation.

Perhaps the best known case in which the Court relied, in part, on sociological and psychological data to decide a constitutional question is *Brown v. Board of Education* (1954). Attorneys for the black school children and their parents presented a number of studies concerning the effect of segregated education on black children. The Court cited these studies as ample support for finding that segregation has a detrimental effect upon the educational opportunities of black children. As Chief Justice Warren indicated, separating children from others of similar age and qualifications solely because of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."

Some critics of the Court's use of sociological and psychological data point out that its reliance on such information suggests that if the data changed, so would the Court's resolution of the constitutional question posed. Others say that this conclusion does not necessarily follow. After all, the studies mentioned in *Brown* were relegated to a footnote in the opinion and were not essential to the Court's decision.

Natural Law

As early as 1798, Supreme Court justices were arguing about whether the new Constitution gave the Supreme Court the authority to invalidate statutes

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Did the new Constitution authorize the justices to supplement its express provisions with principles of natural law?

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that do not conflict with any specific provision of the Constitution, but are against natural justice. The notion that unwritten fundamental law existed and imposed limits on legislative powers was a commonly held belief in the late eighteenth century. Did the new Constitution authorize the justices to supplement its express provisions with principles of natural law?

In *Calder v. Bull* (1798), Justice Chase argued that "there are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power." But Justice Iredell replied:

> . . .The ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject; and all that the court could properly say, in such event, would be, that the

> legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

In *Fletcher v. Peck* (1810), Chief Justice Marshall relied both on "general principles common to our free institutions" and the particular provisions of the contract clause to strike down a state law rescinding a prior fraudulent land grant. In more recent years, the Court has been wary of claiming any general power to invalidate laws which violate natural law. Critics of the modern Court contend, however, that the Court has, in effect, exercised such a power in many recent cases.

The cases most frequently pointed to as resting on natural law reasoning are those striking down laws regulating contraceptives, e.g., *Griswold v. Connecticut* (1965), and abortions, e.g., *Roe v. Wade* (1973). Critics point out that there is no mention of birth control devices or abortion in the Constitution and argue that the Court must be basing its opinions on unwritten natural law limitations on legislative power. Some justices have agreed with this criticism and have dissented in such cases. For example, in *Griswold v. Connecticut*, Justice Hugo Black dissented and accused the majority of claiming "for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive." The majority of the Court, however, denies it is enforcing natural law. The Court argues instead that certain aspects of privacy (including making decisions concerning contraception and abortion) are fundamental liberties protected against undue government interference by the due process clauses of the Constitution.

Societal Consensus

Assuming the impossibility of discovering principles of natural law or natural justice, some contend that the Court should, nevertheless, try to discover and apply existing societal consensus about fundamental rights in interpreting the open-ended clauses of the Constitution. What constitutes due process or cruel and unusual punishment or equal protection should be decided in light of contemporary societal consensus about what constitutes fundamental fairness or decency or equality. Others go further and argue that the Court should look to *emerging* consensus and enforce a maturing sense of decency.

Few would contend that existing and emerging societal consensus do not affect the Supreme Court's interpretation of the Constitution. At a minimum, an existing political consensus places an informal constraint on how far the Court can go in breaking new ground in constitutional interpretation. But there are times when the Court seems to rely more openly on societal consensus in resolving constitutional questions. For example,

the modern Court's interpretation of due process has been explicitly keyed to what the Court perceives to be American notions of fundamental fairness and our maturing sense of decency. And it is clear to most that while these ideas are rooted in tradition, they change over time as our society changes. Indeed, recent cases cutting back on the Bill of Rights protections afforded those accused of crimes suggest that changes in society's notions of fundamental fairness can diminish as well as enhance constitutional protections.

Protecting Political Processes

Legal scholar John Ely has argued that the Court should largely confine the exercise of its power of judicial review to representation-reinforcing cases; that is, to cases concerned with assuring full and equal public participation in political processes. Other questions should then be left to be resolved through the representative political process. This limited role for the Court supposedly gets around the countermajoritarian difficulty and lessens the problem of subjectivity.

The Court's decisions on issues such as legislative reapportionment (one person, one vote) and voting rights are examples of representation-reinforcing cases, and Ely rightfully applauds these decisions. The Court must go further, however, to fulfill the purpose of the Bill of Rights and similar constitutional limitations on majority rule.

Conclusion

Media reports of the Meese-Brennan debate often portray the controversy as ideological and fail to place it in context as part of the larger debate about the appropriate role of the Supreme Court in our constitutional system. This larger debate is neither new nor inherently tied to particular political ideologies. Rather, the debate springs from long-standing questions about the legitimacy of the Court's exercise of the power to review the constitutionality of acts of the other branches of the federal government and of state governments.

Recognition of questions about the legitimacy of judicial review has led to attempts to limit or constrain the exercise of this formidable power. These efforts to limit the Court have focused on imposing constraints on the process of constitutional interpretation by identifying what are appropriate—and inappropriate—sources of guidance in interpreting the Constitution.

The Meese-Brennan debate, a part of this larger argument about appropriate interpretive constraints, is both as old as the Constitution and as new as tomorrow's newspaper.

ENDNOTES

1. William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," presented at Text and Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985.
2. Henry Steele Commager, ed., *Documents of American History* (New York: Appleton-Century-Crofts, Inc., 1949), p. 389.

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SUMMARIES OF CASES

Marbury v. Madison, 1 Cranch 137; 2 L. Ed. 60 (1803).

In compliance with the Act of Congress of February 1801, an act revising the judicial system, a commission for William Marbury, as a justice of the peace for the county of Washington, D.C., was signed by John Adams, then president of the United States. The seal of the United States was affixed to it, but the commission never reached Marbury. It was held back by James Madison, secretary of state under Jefferson. Marbury, desirous of the commission, filed an affidavit on which basis a rule was granted requiring the secretary of state, Madison, to show cause why a mandamus should not be issued directing him to deliver to Marbury his commission. The Judiciary Act of 1789 in Section 13 had provided that the Supreme Court could issue writs of mandamus. In an opinion by Chief Justice Marshall, the Supreme Court held that the appointment, by President Adams, conferred on Marbury a legal right to the office for the space of five years. Since Marbury had a legal right, this right was obviously violated by the refusal of Madison to deliver to him the commission. Thus, a remedy under United States laws was due Marbury. The Supreme Court refused to issue a writ of mandamus to Madison, however, reasoning that this would have been an exercise of original jurisdiction not warranted by the Constitution. Justice Marshall wrote that Congress had no power to give to the Supreme Court original jurisdiction in other cases than those described in the Constitution. (This case derives its extreme importance from the fact that this was the first time the Supreme Court declared an act of Congress unconstitutional.)

Fletcher v. Peck, 6 Cranch 87; 3 L. Ed. 162 (1810).

John Peck deeded to Robert Fletcher lands in the State of Georgia, which had been bought from the State of Georgia. The contract was executed in the form of a bill passed through the Georgia legislature in 1795. The next legislature rescinded the act and took possession of the land. Fletcher sued Peck to regain the purchase price. The Supreme Court, in yet another historic opinion by Chief Justice Marshall, held that an executed contract in the form of a legislative grant of land by the state itself through its legislature could not be rescinded later by the state. Although the initial bill which formed the contract was said to have been induced to passage by bribery, the chief justice reasoned that the State of Georgia was restrained, either by general principles that are common to our free institutions or by particular provisions of the Constitution of the United States, from passing a law whereby the estate of plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

Martin v. Hunter's Lessee, 1 Wheaton 304; 4 L. Ed. 97 (1816).

In the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603, the Court reversed the decision of the state court and sustained title to certain Virginia land previously held by Lord Fairfax, a citizen and inhabitant of Virginia until

his death in 1781. He devised the land to Denny Fairfax (previously Denny Martin), a native-born British subject who resided in England until his death. The Court held that Denny Fairfax, although an alien enemy whose property might have been confiscated, was in complete possession of the land at the time of the commencement of the suit in 1791 and up to the treaty of 1794. It was said to be clear "that the treaty of 1794 completely protects and confirms the title of Denny Fairfax, even admitting that the treaty of peace left him wholly unprovided for." Denny Fairfax died while the suit was still pending, and the Supreme Court vested title in his heirs. Hunter's lessee claimed title under the Constitution of Virginia. In the opinion by Mr. Justice Story, the Supreme Court held that the appellate power of the United States does extend to cases pending in the state courts. According to the opinion, there were two reasons for reaching this result. First, appellate jurisdiction had been given by the Constitution to the Court in all cases under the Constitution where it had no original jurisdiction, subject, however, to such regulations and exceptions as Congress may prescribe. The second reason was the importance and necessity of uniformity of decisions throughout the United States.

Cohens v. Virginia, 6 Wheaton 264; 5 L. Ed. 257 (1821).

To effect improvements in the City of Washington, Congress passed a law in 1802 authorizing the District of Columbia to conduct lotteries. Acting under this authority, the city passed an ordinance creating a lottery. The State of Virginia had a law forbidding lotteries except as established by that state. P.J. and M.J. Cohen were arrested in Norfolk, Virginia, charged with selling tickets for the Washington lottery. They were found guilty and fined $100. They appealed to the Supreme Court, to which Virginia did not object since the states were desirous of forcing the issue of the Supreme Court's authority over state actions. The Court held that the jurisdiction of the Court was not excluded by the character of the parties. Thus, "where, then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defense set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can, with no propriety, we think, be denominated by a suit commenced or prosecuted against the state whose judgment is so far reexamined. . . .Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the Constitution and laws of the Union."

Cooper v. Aaron, 358 U.S. 1 (1958).

The governor of Arkansas along with the legislature attempted to prevent the school board of Little Rock, Arkansas, from obeying a federal court's desegregation order. The governor used the National Guard to prevent the enrollment of nine black children into Little Rock High School. This action was taken under the contention that the holding in *Brown v. Board of Education* was not binding on the school board. In a decision signed by all nine of the justices, the Supreme

Court refused to give the school board another two and one-half years to phase in integration of the schools. The Court firmly stated that "the federal judiciary is supreme in the exposition of the law of the Constitution." They also made it clear that the Supreme Court's interpretation of the Constitution is binding on state legislatures and executive and judicial officers.

Brown v. Board of Education of Topeka, 347 U.S. 483; 74 S. Ct. 686; 98 L. Ed. 873 (1954).

A series of cases went to the Supreme Court from the States of Kansas, South Carolina, Virginia, and Delaware. Since all of the cases involved the same basic problem—Negro minors, through their legal representatives, seeking the aid of the courts in obtaining admission to the public schools of their respective communities on a nonsegregated basis—all were determined by one decision of the Court. The Kansas case is taken as the nominal leading case. In the various states, the Negro children were of elementary or high school age or both. Segregation requirements were on a statutory and state constitutional basis except in Kansas where only statutory provisions were involved. The Supreme Court in this landmark decision determined that segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, does deprive the children of the minority group of equal educational opportunities. The Court, in a unanimous decision written by Chief Justice Warren, said, "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Osborn v. Bank of the United States, 9 Wheaton 788; 6 L. Ed. 204 (1824).

The State of Ohio levied an annual tax on the Bank of the United States of $50,000. Officers of the Bank refused to pay the tax and the state officials collected by force. The Bank of the United States was chartered by Congress, and brought suit in the Federal Circuit Court of Ohio, as authorized by its charter, to recover the funds collected and restrain Osborn, Auditor of Ohio, and other state officials from collecting the tax. The Supreme Court held that Congress could give the bank authorization to sue state officials in the Circuit Courts. The doctrine of *McCulloch v. Maryland*, that Congress can establish a bank and that a state may not tax that bank, was the basis for the holding. It was found that the state was not a party on the record, so the case could not be construed as a violation of the Eleventh Amendment, which explicitly excludes from the judicial power of the United States any suit "against any one of the States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

McCulloch v. Maryland, 4 Wheaton 316; 4 L. Ed. 579 (1819).

Congress incorporated the Bank of the United States, a branch of which was established in Baltimore. The State of Maryland required all banks not chartered

by the state to pay a tax on each issuance of bank notes. McCulloch, the cashier of the Baltimore branch of the Bank of the United States, issued notes without complying with the state law. Action was brought on the part of Maryland to recover the penalties. In its opinion, the Supreme Court first decided that Congress was empowered by the Constitution to incorporate a bank. It went on to say that because the Constitution and the laws made in pursuance thereof are supreme and cannot be controlled by the various states, the State of Maryland could not tax a branch of the United States Bank located in Maryland. The Court stated that when Maryland taxed the operations of the federal government, it acted upon institutions created not by its own constituents, but by people over whom they claimed no control.

Plessy v. Ferguson, 163 U.S. 537; 16 S.Ct. 1138; Al. L. Ed. 256 (1896).

In 1892, Plessy, a citizen of Louisiana, having seven-eighths Caucasian and one-eighth African blood, boarded a train from New Orleans to Covington in the same state. The conductor ordered him out of the car for white passengers and to sit in the Negro car. When Plessy refused to obey the order, he was forcibly jailed by a policeman and convicted of violating a state statute of July 10, 1890, which required separate accommodations for white and colored passengers on railroads. An information was filed against him for the violation, and Plessy filed a demurrer against Ferguson, judge of the Criminal District Court. Plessy appealed on a writ of error when relief was denied him in the state court. The Supreme Court held that the Louisiana statute providing for "equal but separate" railway carriages for the whites and colored did not violate the Thirteenth and Fourteenth Amendments. The object of the law, according to the Court, was to insure absolute equality of both races before the law. However, this was said to be a political equality and not a social equality. Thus, the doctrine of "separate but equal" was established.

Muller v. Oregon, 208 U.S. 412; 28 S.Ct. 324; 52 L. Ed. 551 (1908).

An Oregon statute made illegal the employment of women in any mechanical establishment, factory, or laundry for more than 10 hours during the day. Muller was convicted and fined for violating this statute in his laundry. The statute was held to be constitutional by the Supreme Court. In following the rationale used in *Lochner v. New York*, the Court rationalized that a woman's physical well-being "becomes an object of public interest and care in order to preserve the strength and vigor of the race" and thus justifies the "special legislation restricting or qualifying the conditions under which she would be permitted to toil." The two sexes differ, the Court concluded. This difference was held to justify a difference in legislation.

Calder v. Bull, 3 Dallas 386; 1 L. Ed. 698 (1798).

A dispute arose between Calder and his wife on one side and Bull and his wife on the other side concerning a right to property left by N. Morrison, a physician, in his will of March, 1793. The said will was rejected by the Probate Court of Hartford, and the decision was given in favor of Calder and his wife.

As a result of a law enacted in 1795 by the state legislature, a new hearing of the case (which was not allowed according to the old law) took place, and the will involved in this case was approved, thus transferring the right to the property from Calder to Bull. This was held not to be an *ex post facto law*, which is a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. The Court said that a distinction must be made between retrospective laws and *ex post facto* laws. Likewise, *ex post facto* laws do not include laws affecting contracts, but only criminal or penal statutes.

Griswold v. Connecticut, 381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 519 (1965).

Connecticut's birth control statute provided that "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception" was subject to fine or imprisonment or both. The statute further specified that a person who assisted another in committing any offense could be prosecuted and punished as an accessory as if he were the principal offender. Estell Griswold, Executive Director of the Planned Parenthood League of Connecticut, was convicted of being an accessory. The Supreme Court in finding the Connecticut statute unconstitutional established a new constitutional "right of privacy."

Roe v. Wade, 410 U.S. 113; 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973).

Texas statutes prohibited abortions except by medical advice for the purpose of saving the life of the mother. Proceeding under the pseudonym of Jane Roe, a federal class action was instituted against the District Attorney of Dallas County challenging the validity of the statutes. Her life did not appear to be threatened by a continuation of the pregnancy, so no legal abortion was possible in Texas. In this landmark decision the Court held that the term "person" as used in the Fourteenth Amendment did not include the unborn. The Court did not resolve the question of when life begins saying that "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." The Court determined that the right of privacy in deciding whether to obtain an abortion is a fundamental "liberty" protected by the due process clause. The Court held that government must demonstrate a compelling governmental interest to justify restrictions on a woman's right to choose whether to terminate a pregnancy. The interest in protecting the pregnant woman's health becomes compelling after the first trimester and can then justify regulations to protect her health. The government's interest in protecting the potential life of the fetus becomes compelling after "viability" and can justify restrictions on abortions during the third trimester of a pregnancy. During the first trimester of a pregnancy, neither of these government interests are compelling and thus the abortion decision must be left to the woman and her doctor.

Source: Paul C. Bartholomew and Joseph F. Menez, *Summaries of Leading Cases on the Constitution* (Totowa, N.J.: Rowman and Allanheld, 1983).

QUESTIONS FOR DISCUSSION

1. What is the principle of judicial review, and how was it first established?
2. Although judicial review has long been accepted as an important function of the Supreme Court, what issues or problems have arisen over this role of the Court?
3. In the process of judicial review, what are the sources of guidance or restraint upon which the Supreme Court has relied when making decisions? In your opinion, which of these "interpretative restraints" seem most acceptable today?
4. Where do the differing positions of Justice Brennan and Attorney General Meese fit into the long-standing arguments over judicial review? Do you tend to agree with one or the other? Or with a position somewhere between the two?

ESSAY THREE

Rule of Law or Rule of Men? The Problem of the Separation of Powers

By Richard H. Cox

Introduction

> Wise politicians will be cautious about fettering the government with restrictions, that cannot be observed; because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breasts of rulers toward the constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable.
>
> *The Federalist* (No. 25: 10)[1]

An old, old question about politics is whether it is better to be ruled by the best laws or the best men.[2] When our Founding Fathers crafted the Constitution in 1787, they directly faced and answered that question. For reasons which they thought not only good, but compelling, they essentially chose rule of best laws. And yet, as we shall see, they could not evade the difficulties inherent in that answer, not any more than those who choose rule of the best men can evade the difficulties inherent in that answer.

The controversy over President Reagan's covert sale of arms to Iran affords an instructive entry into our inquiry. Beginning from that controversy, I wish to stress that the sharpest critics and the staunchest defenders of Mr. Reagan *agree* that his actions are symptomatic of a crisis in American constitutional government. But they profoundly *disagree* as to what the crisis is all about.

I shall begin by sketching the crux of the controversy over the arms sale. Second, I shall outline two radically different interpretations of the nature of the Iran-Contra crisis said to have been precipitated by President Reagan's words and deeds. Third, I shall examine the fundamental structure of government as set forth in the Constitution and explained in the essays of *The Federalist*. Fourth, I shall argue that the disagreement con-

cerning the nature of the crisis rests on a tension between the principle of the *rule of law* and the principle of the *rule of men*; and that this tension is rooted in the inevitable effects of the fundamental constitutional principle of the *separation of powers*, above all as that principle pertains to foreign relations.

The Iranian Arms Sale Controversy

President Reagan justified his approval of the covert arms sale, ultimately, on the ground that it was part of his foreign policy. He sought, on the one hand, to facilitate relations with an allegedly moderate group of the Iranian rulers. In so doing, he hoped to further the interest of the United States to bring peace and stability to the volatile, explosive, and strategically important Middle East. On the other hand, he sought to facilitate the release of the American hostages held in Beirut. In his public explanations of his actions, Mr. Reagan did not dwell on the constitutional basis of his conduct of foreign policy. Indeed, he seems to have assumed that his actions were properly, i.e., constitutionally, rooted in his exercise of what Article II laconically calls "the executive power," including the powers inherent in the activity of the "commander in chief" of the armed forces.

His critics have attacked the president on two crucial points. They have argued that the president, whether knowingly or not, permitted or facilitated the actual or intended illegal diversion of funds from the arms sale to support the anti-Sandinista Contras. They have also argued that the president acted in contradiction to the fundamental, explicit public policy of the United States—a policy that condemns, seeks to constrain, and, when circumstances permit, to punish political terrorism, whether carried out by individuals or by government. In short, the critics have accused Mr. Reagan of acting or making it easier for others to act illegally and unwisely.

Reduced to their core, the accusations appeal to two severe but very different standards. The first is the standard of *legality* (rule of law), the second that of *practical wisdom* (rule of men). The first standard appeals to laws Congress has passed, and ultimately, to the Constitution. These comprise what the Constitution, in Article VI, calls the "supreme law of the land." The second standard, that of practical wisdom, necessarily transcends the laws and the Constitution. It is the standard of what a statesman would do in devising and carrying out public policy, taking the fullest possible account of all circumstances and all likely consequences of specific speeches and actions. Such wisdom, by its very nature, stubbornly resists reduction to legal or constitutional definition. In essence, it is rule of a man, not of law, provided it is understood that this is a "good" statesman.

It is hardly surprising that the appeal to legality is more readily made than the appeal to wisdom. Indeed, it would be astonishing if it were otherwise. For a fundamental purpose—some might say *the* fundamental purpose—of the Constitution is to set forth a framework to establish laws accepted by common consent to be *the* standard of right and wrong. Therefore, these laws are accepted to be the common measure to decide controversies among men and to direct the conduct of government toward other governments.[3] The seeming clarity and stability of such a standard are, understandably, its great virtues. But whether those virtues do not also fall victim to corresponding vices is a large and difficult question, above all with respect to the conduct of foreign relations.

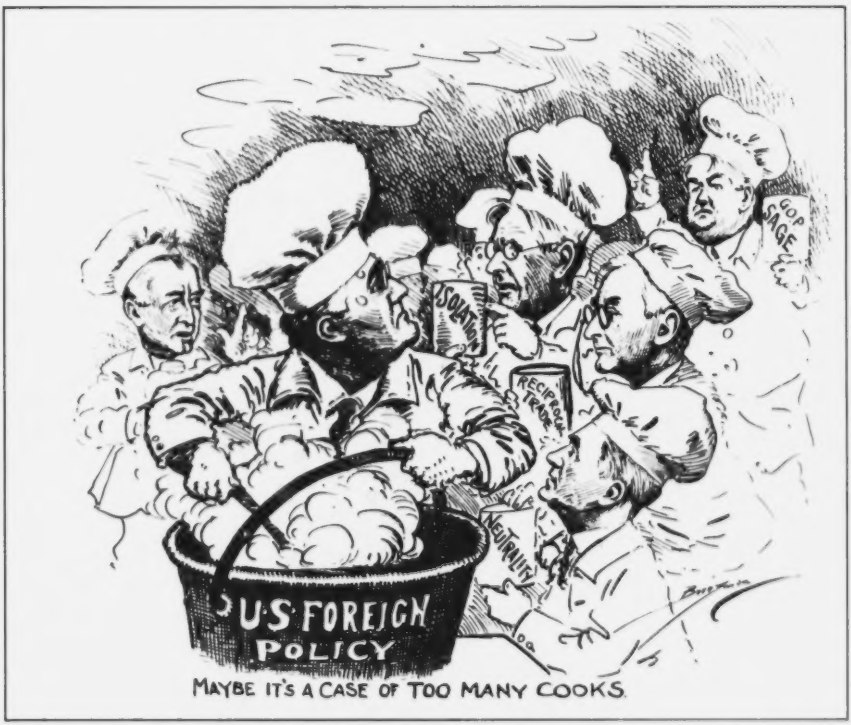
Interpretations of the Crisis

The two opposing interpretations of the crisis start from the remarkably blunt defense of Mr. Reagan made by Patrick Buchanan (then Mr. Reagan's White House communications director) in an article in the *Washington Post*.[4] Mr. Buchanan attacked Republicans for not rallying to the president and his cause. To the outcry that Mr. Reagan permitted or encouraged Lieutenant Colonel Oliver North (then deputy director for political-military affairs on the National Security Council) to break the law, Buchanan makes two points. First, he questions whether we *know* North broke the law. Second, and much more crucial to the argument, he suggests that even if North did break the law, he was a hero for doing what he did—he acted to try to stem the tide of a Soviet-supported communist regime in Nicaragua, and thus, sought to carry out the long-standing policy of Mr. Reagan. What is more, in support of this second line of reasoning, Buchanan gave three examples of people who were later judged to be heroes even though they technically broke existing laws: (1) Americans who helped slaves escape to the North by the underground railway; (2) President Franklin Roosevelt, who ordered American destroyers to attack Nazi submarines well before the United States' official entry into the war against Nazi Germany; and (3) Americans who ran guns to the Israelis in 1947-48.

There were two remarkably different responses to Mr. Buchanan's spirited defense of Mr. Reagan. The first is by an unnamed editorial writer for America's prestigious and distinguished literary magazine, the *New Yorker*.[5] The second is by Douglas Jeffrey, an editor of the *Claremont Review of Books*.[6]

Executive Challenge to Rule of Law

The main thesis of the *New Yorker* editorialist is as follows. Since World War II, there have been three extremely dangerous episodes in which "people



During Franklin Roosevelt's presidency, separation of powers in foreign affairs was the subject of this editorial cartoon.

in power have mounted serious challenges to the rule of law," to the principle of the separation of powers, and ultimately to the Constitution, always "in the name of national security." The first was the attack by the late Senator Joseph McCarthy against alleged Communists in government. The second was the prolonged crisis of the Vietnam War and Watergate, in which "three presidents justified their circumvention of Congress and the law by invoking the overriding needs of national security." The third and continuing episode is Mr. Reagan's "secret, runaway foreign policy in regard to Iran and Nicaragua."

The editorial concludes that the policies which gave rise to the challenges were "the three worst political mistakes in our postwar national life," and that if people in power had all rigorously adhered to the rule of law and the Constitution, those mistakes would simply have been avoided. In short, since World War II, a prolonged and very grave constitutional crisis has

been taking place, and it has been rooted in alleged necessities imposed on the American government, particularly on the executive, in the fight against communism. The defiance of the principle of the separation of powers by members of the executive branch can only be corrected by vigorous assertion of its powers by the Congress.

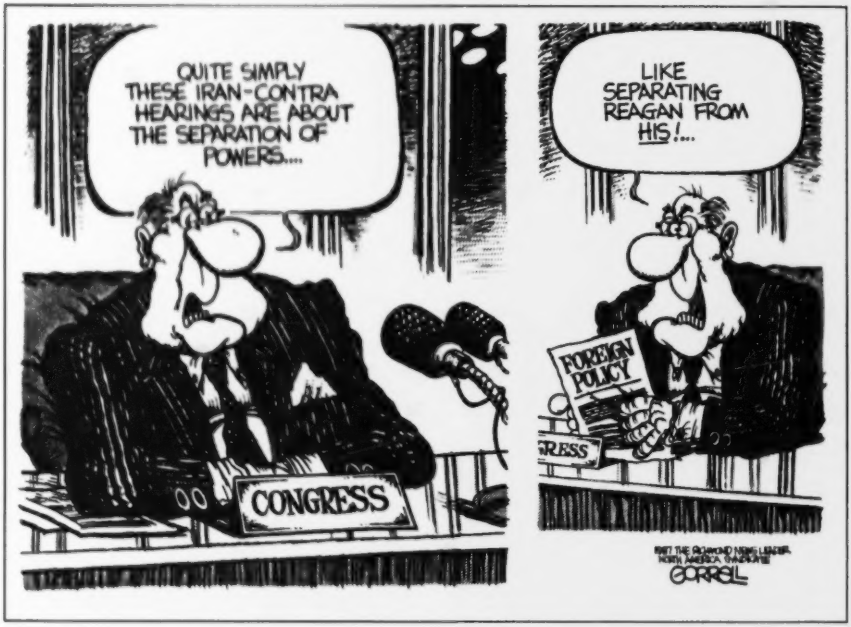
In response to Buchanan's praise of those who have become heroes, even though they technically broke the law, the writer of the editorial uses the example of Franklin Roosevelt to bring home his points: first, that many historians deny that Roosevelt broke the law; and second, even if he did, "he shouldn't have and his actions certainly shouldn't stand as a model for future presidents." As we shall see, this line of reasoning goes to the root of the problem of rule of law versus rule of men.

Legislative Encroachment on Executive Power

Douglas Jeffrey offers an interpretation of the crisis that is essentially at odds with that offered by the *New Yorker*. Jeffrey's main thesis is that while there is a crisis, it is not the one asserted by most members of Congress and many of the press. These critics seek to show that the crisis has been produced by brazenly arrogant deviations from law and from proper administrative procedures by Mr. Reagan and his most trusted subordinates. At the root of this diagnosis is the prescription that Congress must and will further assert its rightful, constitutional, control over executive formulation and conduct of foreign relations.

Jeffrey makes three arguments against this interpretation. First, the controversy is only superficially, albeit plausibly, over procedure or law. At bottom, it is essentially over policy—especially policy toward communist threats, whether from the Soviet Union or from its surrogates, such as the Sandinistas in Nicaragua. Second, the crisis is essentially a long-standing institutional one. It consists of a progressive encroachment of Congress on the executive, particularly in the conduct of foreign relations, in violation of the intended sense of the principle of separation of powers. Third, Mr. Reagan should vigorously make a public defense of both his policies and his subordinates on three related grounds: (1) prudence, meaning the wide degree of discretion and judgment necessary for the energetic conduct of foreign relations; (2) precedence, meaning the kinds of bold deeds (and the arguments that were made to support them) carried out by great presidents, such as Franklin Roosevelt and Abraham Lincoln, especially in periods of war; and (3) the Constitution, or the provision for a strong and independent executive and the principle of entrusting him with broad and crucial powers, especially for the conduct of foreign relations.

In light of this general interpretation, it is hardly surprising that Jeffrey should take a very different view of Buchanan's bold defense of Mr. Reagan


QUITE SIMPLY THESE IRAN-CONTRA HEARINGS ARE ABOUT THE SEPARATION OF POWERS...
CONGRESS
LIKE SEPARATING REAGAN FROM HIS!...
FOREIGN POLICY
GARRELL

The Iran-Contra affair in the Reagan administration raised the age-old issue of the extent of executive power in foreign affairs.

and Oliver North than does the editorialist for the *New Yorker*. Indeed, these two interpreters of our present crisis diverge essentially over the proper answer to two very troubling questions. First, who is to judge what the respective powers of the president and the Congress are concerning the conduct of foreign relations? Second, may the president, in pursuit of policies he thinks essential to the preservation of the Constitution, and of the republic from which it emanates, *ever* violate the law in order to save the higher law of the Constitution?

In thinking about these two interpretations of our constitutional crisis, especially in this year of the 200th anniversary of the crafting of the Constitution, it is both fitting and proper to return to that document and to the principles that inform it. In so doing, we will seek to deepen our grasp of what American constitutionalism meant at the founding in order to better judge present controversies, including that concerning Mr. Reagan's sale of arms to Iran. In initiating this review, we must realize that the two recent interpreters discussed above agreed that the original sense of American constitutionalism is still the correct one, and that integral to that original sense

is the principle of the separation of powers. Where they *disagree* profoundly is on how to construe these two basic ideas, particularly in relation to the executive's handling of foreign relations.

The Constitution and the Separation of Powers

I turn, first, to the bare-bones structure of the original Constitution. By this, I mean the Constitution as it was ratified, prior to the adoption of the first 10 amendments, now commonly called the Bill of Rights.

The edifice of the original Constitution is spare and elegant. It consists of a short preamble, and then seven main articles that set forth the structure and powers of the federal government, as well as certain other provisions, such as the relationship of the federal to the state governments, the mode of amending the Constitution, and the character of the Constitution itself as constituting the *supreme law*. I will focus first on the Preamble and then on the first three articles, because it is these parts that most fully suggest the ends of the Constitution as well as the underlying principle of the separation of powers.

The principle of the separation of powers, . . . is necessarily implied by the way in which the fundamental law structures the governing power.

The Preamble, which speaks in the name of "we, the people," states six purposes to be effected by the ordination and establishment of the Constitution. They are to: (1) *form a more perfect union*, (2) *establish justice*, (3) *insure domestic tranquility*, (4) *provide for the common defence*, (5) *promote the general welfare*, and (6) *secure the blessings of liberty to ourselves and our posterity*. Whether the Founders intended this order to signify precedence of one purpose over another is unclear, as is the precise relationship among the stated purposes, and the essential meaning of each key term. For example, just how establishing "justice" is to be connected to securing "liberty," or how each other phrase is to be connected to "providing for the common defence" is unclear, as well as what each, in itself, means. Perhaps, then, we are meant to infer something concerning these questions from the structure of the government and from the powers accorded to it.

As we reflect on the Constitution from this perspective, we notice certain important things. First, the governing power is at once divided into three

more specific powers—the legislative, executive, and judicial—and allocated to different public officials. Second, the order in which the powers are specified seems to be of critical importance and to rest on the implied argument that there must be known, agreed-upon laws; they must be passed by men chosen by the citizens; and those laws must be confined to certain objectives. Furthermore, in order that those laws may be truly effective, they must be carried out where they apply. But in order for the application to be impartial, there must be a supreme judicial body to settle the controversies that may arise under the Constitution and the laws made under it.

The principle of the separation of powers, though never explicitly referred to in the text of the document, is necessarily implied by the way in which the fundamental law structures the governing power. Furthermore, it is a reasonable inference that the structure and the underlying principle, taken together, must be intended, somehow, to effect the six purposes set forth in the Preamble. The question is, how?

Arguments of the Federalist Essays

In this discussion of connections, I will focus primarily on the fourth element of the Preamble, which posits the purpose of providing for the common defense. And for a reasoned interpretation of the connection we are seeking, I will turn to certain parts of *The Federalist*. These remarkable essays were originally published in October 1787 to May 1788 in New York newspapers. They were written by Alexander Hamilton, James Madison, and John Jay, all under the pen name of "Publius"—a Latin word meaning a citizen concerned with the public good. The essays were intended to counter Anti-Federalist opposition to the new Constitution and persuade citizens to support ratification of the new Constitution.

I will begin by placing the argument concerning provision for the common defense and its relationship to the separation of powers in the context of the general argument by "Publius." Publius starts from the premise that men can institute "good government" by "reflection and choice," rather than simply submit to a government that derives from "accident and force." Numbers 2-36 of *The Federalist* then state the general principles of good government: *Safety* is the first principle although not the highest, which is *justice*. And *energy* is the necessary means. Numbers 37-84 then relate these principles to those of republican government.

The core meaning of *safety*, according to Publius, is twofold. On the one hand, it means the security of men's bodies and properties against dangers that emanate from foreign or civil war; on the other hand, it means security of the liberty of the people against possible encroachments of the government.

Energy means vigorous, informed, and intelligent action—all these being necessary to permit the government to do the essential work of defending and governing. Ultimately, this implies the ability of the government to command and use the collective force of the body politic in order to secure its proper objectives, whether that force is used against foreign enemies or against law-breaking citizens.

The energy that is essential to providing for the common defense is at once necessary and dangerous. It is necessary in the sense that without the requisite energy the common defense becomes at best problematic, and at worst impossible; and without effective provision for the common defense, the republic would sooner or later cease to exist as an independent political society, thus being incapable of realizing the other great purposes stated in the Preamble of the Constitution. But the requisite energy also is potentially dangerous because it can be misused, whether against foreign or domestic foes. Two questions thus arise. How can the requisite energy be provided, and how can its misuse be prevented?

Analysis and interpretation of the executive power answer the first question; and analysis and interpretation of separation of powers answer the second.

The Executive Power*

First, it is argued in *The Federalist* that the *extent* of the powers conferred on the federal government must be commensurate with the purposes to be achieved. The most fundamental problem of providing for the common defense is that such defense must take place in what is sometimes called "the state of nature" among independent, sovereign polities. This is a condition in which no central government exists, and hence no truly settled, known, and enforceable laws exist to regulate the conduct of such polities. In short, the state of nature among sovereign states verges on, or is essentially, an anarchic state of affairs.

The necessary implication of this state of affairs is that the federal government—as distinct from the state governments—must possess, without limitation, the power to form, direct, and support national forces. In support of this assertion, Publius says:

> The circumstances that endanger the safety of nations are *infinite*, and for this reason no *constitutional* shackles can *wisely* be imposed on the power to which the care of it is committed. (No. 23: 4, emphasis supplied)

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*See Appendix for an analytical outline of the main arguments on executive power in *The Federalist.*

The crux of the matter is contained, I believe, in the word "wisely." Publius seeks to persuade those who are deliberating on whether or not to ratify the Constitution that, though it would be perfectly *possible* to impose "constitutional shackles" on the federal government's power to form, direct, and support national military forces, it would be *unwise* to do so given the exigencies that arise necessarily from the state of nature among independent, sovereign polities. This emphasis upon what wisdom requires is, as we shall see presently, of the utmost importance concerning the conduct of foreign relations, and is ultimately in tension with the principle of rule of law.

The power to direct national forces is the central and focal power, and it is in this regard that arguments concerning executive power are most intense. For though it is possible for the legislative branch to *seek* to direct national forces, it is utterly problematic whether it can do so effectively given the multiplicity of legislators and the two houses of Congress. To see the framework for treating this problem in *The Federalist*, we must consider the main elements of Publius' argument in support of the executive power as delineated in the Constitution.

Publius argues very forcefully in support of those provisions of the Constitution that institute a new sort of executive—new, that is, in relation to either the existing state constitutions or the Articles of Confederation. The most relevant points of that argument are divided into two parts: those that have to do with *structure* and those that have to do with *interpretation*.

As for the structure, it is noteworthy that (1) the executive is a single public official in contrast to a plural executive council; (2) the president is entrusted with all of the executive power—an unqualified grant—in contrast to the Congress, which is only entrusted with "the legislative powers herein granted"; (3) the president is also entrusted with the specific power to be commander in chief of the army and navy and of the militia of the states; and (4) the president is entrusted with the power to make treaties and appoint ambassadors, in contrast to the Senate, which may only advise and consent with respect to these particular executive actions.

As for the interpretation of the executive power, note that although the federal government as a whole is intended to be energetic to achieve the main objective of safety, only the executive power, among the three branches, is ever explicitly said to be necessarily "energetic" (No. 23: 4). It is the peculiar task of the executive to enforce the law internally and to conduct foreign relations externally, and both of these tasks preeminently require energy.

The main features of executive energy that derive from the structure of the executive set forth in the Constitution are

a. *unity.* This quality derives from the fact that the executive is a single person, not a plurality of humans. As such, the executive is in prin-

ciple able to proceed in the conduct of this high office with "decision, activity, secrecy and despatch."

b. *duration.* This quality derives from the fact that the executive is elected for a term of four years, and may be reelected, thus giving him the expectation of being able to enter upon and carry out policies that usually require considerable time.

c. *adequate compensation.* This quality derives from the fact that the president receives a salary and hence has independence.

d. *competent powers.* This quality derives from the fact that the Constitution entrusts to the executive the necessary powers, and makes him judge of how to exercise them.

In addition to these structural qualities, there are critically important qualities that derive from tendencies of the office and from the kinds of men who are therefore likely to seek election to it. These reinforce the structural qualities and give greater potency to executive energy. The argument of Publius on this point is roughly as follows. The executive proposed in the Constitution is likely to attract men who possess "the noblest minds." The reason is that such minds are moved by a "love of fame," and fame may be achieved by successful execution of "extensive" and "arduous" enterprises "for the public benefit." What is more, succeeding requires the possession and the exercise of those qualities of noble minds that most reveal human excellence, including courage, magnanimity, fortitude, daring to act on one's own opinion, firmness, wisdom, integrity, and experience (No. 72, *passim*).

. . .[the executive power]. . .is the one most intrinsically concerned with. . .foreign relations, and, therefore, the one that requires the greatest political virtues.

To sum up *The Federalist* view of the executive power: That power, of all the three that make up the new federal government, is the one most intrinsically concerned with the most dangerous sphere of politics, foreign relations, and, therefore, the one that requires the greatest political virtues. It follows that only if people who possess such political virtues come to wield the executive power will there be a reasonable prospect of providing effectively for the common defense. As a result, three issues arise. How will such people come to be in a republic which eschews direct teaching

and reinforcing of such virtues? Will the citizenry detect such virtues and then elect people who possess them? Could people of such outstanding abilities be tempted to abuse them under the guise of only providing for the common defense? It is in respect to the last of these questions that the principle of the separation of powers must next be examined.

Dividing the Powers**

Publius' argument here rests on the fundamental political truth that to concentrate all three powers of government in one set of hands is "the very definition of tyranny" (No. 47: 3). The reason is that men in political life deal with both "passions" and "reason." Their passions, such as the powerful fear for one's safety, or the vehement desire to protect one's property, which is essential to that safety, impel them to extend their power over others. Their reason may tell them, in principle, that that extension should be controlled. But in reality, reason is not always effective, and effective institutions of government must come to the aid of individual reason.

But the problem of the tendency for power to encroach then shifts to the level of government. Public officials, being human, are likely to seek to extend the power of the office they hold. Hence, government itself must be divided into three branches, each with its special sphere of political action. This structure seeks to achieve what might be called the *institutionalization of reason*. In other words, it becomes a reasonable structure to support, and perhaps serve as a surrogate for individual reason within each public official, and thus control the tendency for power in the executive to encroach on other branches.

Maintaining Separation of Powers

However, no human institutions are self-correcting. What is necessary, therefore, is to discover how the structural separations of powers can be *maintained*, especially when there are alleged or actual encroachments of one power on another. Here, it is necessary to pay particular attention to Publius' argument that in a republican government the *fundamental tendency* is for the legislative power to aggrandize itself at the expense of the executive and judicial powers. This tendency arises from the fact that, in republican government, "the people are the only legitimate fountain of power" (No. 49: 3). The legislators they elect make up not only the largest branch of government, but they are also, in principle and in practice, closest to the people in outlook. This being true, the further question arises as to how to best ensure a proper "constitutional equilibrium."

**See Appendix for an analytical outline of the main arguments on the separation of powers in *The Federalist*.

Publius puts forth the following three possible controls:

1. Rely on precise demarcation of the boundaries between the three powers in the Constitution itself.
2. Provide for either occasional or periodical appeals to the judgment of the people through specially elected conventions.
3. Order the structure and operation of the government in order to provide a check on encroachment.

The first two possibilities, Publius calls "external" measures, for they stand external to the operation of the government in motion. The third, Publius calls an "internal" measure, for it is integral to that motion. It is impossible, here, to detail the nuances of Publius' argument. Suffice it to say that he ends by placing decisive emphasis upon the third, or internal measure, for reasons which I will briefly describe.

Problems with Internal and External Measures

According to the essays of *The Federalist*, two difficulties arise when trying to rely too greatly on strict demarcation of the three powers of government. First, not even the "greatest adepts in political science" have been able to "discriminate and define, with sufficient certainty" the precise boundaries of "the three great provinces" of government (No. 37: 10). Second, government in motion necessarily encounters a large variety of circumstances. Particularly in the sphere of foreign relations, these circumstances are both difficult to anticipate and even more difficult to control. This is above all true in a time of war, when a nation's prime concern is for energetic, central, and unified direction of the collective force of the republic. In that condition, "it is the *nature* of war to *increase* the executive at the expense of the legislative authority" (No. 8: 5). To insist, then, on rigid adherence to fixed demarcations when the circumstances necessarily call for flexibility and vigor of action is to sacrifice the end—effective provision for the common defense—to the means—constitutional specification of powers.

Publius' argument against the second measure, appeals to the people through the device of conventions, indicates a real difficulty with the pure theory of republican government—that all powers of government ultimately derive from the people. But, this means that none of the three powers can legitimately claim an exclusive or superior right to settle disputes over the boundaries of power. Hence, it is the people who should, through conventions, decide controversies concerning alleged encroachments of power by each branch of government upon the other. The rejoinder in *The Federalist* to this theory—which actually comes from arguments by Thomas Jefferson—is remarkable for its measured yet unmistakable contention that such appeals are neither *desirable* nor likely to be *effective*.

The Federalist papers were written by three men. John Jay (upper left), Alexander Hamilton (upper right), and James Madison (lower left) signed their essays as "Publius."

The argument of Publius against the desirability of appeals to the people is in two phases. In the first phase, he argues that problems concerning the boundaries of the three powers are likely to be frequent, necessitating frequent appeals to the people. But every such appeal necessarily implies some "defect in the government." Consequently, the people will not develop the "veneration" for the government that is necessary for its stability.

Publius also argues even more pointedly that frequent appeals to the people are likely to stir up "public passions," particularly in relation to inevitable differences of opinion among public officials on "great national questions." The most dangerous consequence of this could be that as the people become factionalized with different opinions and strong passions, they may lose confidence in their leaders, and in the extreme case, even doubt their patriotism. In short, the initial problem of whether one branch has encroached gives way to the problem of what the effect will be of having passionate factions of the people at odds over great national questions, while the dispute is disguised as one concerning the separation of powers (No. 49: 6-7).

In the argument against the *effectiveness* of appeals to the people, Publius stresses two points. First, as previously noted, it is the legislative branch in republican governments that tends toward "aggrandizement" at the "expense of the other departments." But, since the legislators are closest to the people, they are most likely to be elected to conventions, and would thus judge their own cases. Second, the people's choices for the convention will be rooted in passionate attachment to men who are involved in the question at issue, and thus again "the *passions*. . . not the *reason* of the public would sit in judgment" (No. 49: 10).

These arguments by Publius against the pure theory of republican government are, strictly speaking, a digression from the investigation of the Constitution, for that document contains no provision for appeals to the people. The purpose of the digression is to expose a problem concerning the separation of powers that is intrinsic to republican government and cannot be overcome by an appeal to the people. What can be done? And how effective will alternative measures be?

Remedies: Constitutional Mechanisms and Personal Ambition

Publius addresses these questions in *The Federalist* with an argument that rests, in part, on constitutional mechanisms and, in part, on ambition in the souls of holders of high public office. The constitutional mechanisms consist of explicit devices built into the Constitution. Publius singles out the constitutional power of the executive to veto laws passed by the Congress, but acknowledges that it falls short of a "natural defense," which would consist of an "absolute negative." To supplement the constitutional mechanisms, Publius turns to a principle that the essays of *The Federalist* have made famous, the principle that "ambition must be made to counteract ambition" (No. 51:4).

Now, *ambition* is the political passion that moves men ardently to seek high public office. Whether the attraction to such office comes from the prospect of wielding power over others, from the honor of holding high

public office, or from other motives as well, it is posited by Publius as a potent political force that not only must be allowed to operate, but more crucially, must be encouraged to do so. The fact remains that it is a passion that is being relied on. How, then, to reconcile this reliance on passion with the seeming denunciation of appealing to the public passions of the people? Are we to understand that there is a ranking of passions? Are some passions capable of being mobilized to support good government while others should be constrained because they undermine good government?

With these questions, we touch on one of the greatest difficulties of republican government: The rule of reason over passion in a given human being is the natural rule of the higher over the lower part of human nature. This is self-government in the most literal and noble sense. Indeed, if such rule were both possible and usual in *all* men, then there would be no need for government. But experience shows that such rule is extremely rare, hence that government is necessary.

. . . ambition . . . is posited by Publius [as] a potent political force that not only must be allowed to operate, but more crucially, must be encouraged to do so.

Wisdom As a Solution

Two hypothetical resolutions of the problem of the need for government occur. One resolution is rule by an elite, based simply on wisdom and without consent of the governed. This resolution is alluded to and firmly rejected in the treatment of the separation of powers in *The Federalist*, in the discussion of the impossibility of the "philosophical race of kings wished for by Plato" (No. 49: 6). In so arguing, Publius alludes to and rejects the famous—or infamous—proposal of Plato's Socrates in *The Republic*, whereby either kings would become philosophers or philosophers would become kings, and thus combine wisdom with rule to institute justice.[7] The second and infinitely more practical resolution is that of republican government. In such government, as Publius delineates it, the need for wisdom is still great.

The important question is how to incorporate wisdom. Two different but complementary modes of incorporation are posited. The first is the wisdom of the founders of the republican order, whose institutions will constitute the kind of institutionalized reason discussed above. This form of incorporation of wisdom depends on the perspicacity of the founders—on their acting simultaneously as men who rule and yet do not rule over

the people by crafting *institutions* that will produce the desired effect.

Another mode of incorporation of wisdom is more intricate and problematic still, for it consists of encouraging wisdom without permitting wisdom the right to rule. How is this to be done? Publius' answer is to rely directly on passions that are peculiarly suited to encourage, but not to produce, the possession of wisdom in holders of public office, particularly those who seek to wield the executive power.

Love of Fame and Ambition

The two passions that are most to be relied on are *love of fame* and *ambition*. The latter, as we have seen, is an ardent desire to secure and hold high public office. It is to be encouraged in all who seek elected federal office, in two senses: (1) in the *pursuit* of the office because such pursuit is a form of self-government in that those who engage in it must present themselves to the public as worthy of being elected, and (2) in the *conduct* of the office because the spirited defense of the constitutional prerogatives of each branch is the final and most effective means by which to maintain the constitutional equilibrium that, in turn, is the fence against tyrannical rule.

But love of fame is a different and more elevated passion than ambition. Like ambition, it is intrinsically connected to holding high public office. Therefore, one who is moved by love of fame must, in a republic, present oneself to the people as worthy of being elected. But love of fame is also profoundly different from ambition. It is soaring. It seeks fame for the individual as a single extraordinary human being, who has ably performed towering political deeds. It looks to the judgment of mankind, most likely in a distant future, and thus seeks the only kind of immortality open to mortal man in this world. But to seek to achieve such immortality, the lover of fame must somehow come to possess and to exercise what in older times were called virtues—courage, fortitude, practical wisdom—and, certainly

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[Love of fame] is soaring. It seeks fame for the individual as a single extraordinary human being, who has ably performed towering political deeds.

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most difficult in a democracy, the spirited willingness to rely on one's own judgment of great and hotly contested political questions. In short, one who is a lover of fame and would succeed must be magnanimous and aware of one's great soul and able and willing to exercise its highest faculties in the conduct of public office.

It is small wonder, in light of this perspective, that Publius should connect love of fame most particularly—and perhaps, essentially—to the exercise of the executive power, for it is that office alone which truly opens the prospect of such a consummation. This prospect would be greatest in the area of foreign relations, and, ultimately, of war, the area of public policy with the most unpredictable and dangerous circumstances for the executive. That area thus requires the highest exercise of the supreme practical virtue, which according to an ancient view is the virtue of prudence, or practical wisdom. It is hardly necessary to say that there is no way in which practical wisdom can be produced by simple adherence to the rule of law. For it is in the nature of the rule of law to seek to reduce circumstances to general cases which can be regulated by general rules; whereas, it is in the nature of practical wisdom to judge what the particular circumstances require.

American republican government thus rests on a dilemma. It seeks in principle to be bound by the rule of law. But it also seeks in principle to ensure that, in the soul of its highest public officer, the practical wisdom needed to provide for the common defense will be present.

Conclusion

Are those who possess the requisite practical wisdom likely to arise in a republic such as ours? Historical reflection suggests that three who might be candidates for such an honor have in fact appeared, been elected to hold the executive power, and in wielding it, have achieved a considerable measure of fame: Washington, Jefferson, and Lincoln. This celebration of the bicentennial of our Constitution is an appropriate time to reflect on how they perceived and conducted the exercise of executive power. To do so, however, requires pulling ourselves out of total immersion in our present concerns. Such reflection is not made easy by the incessant hammering of the media and many members of the Congress at the latest titillating revelations about "Irangate." That hammering seems to be guided by one dominant question: "What did you know and when did you know it?" The purpose of the repetition seems to be to reduce the underlying political questions to those of procedure and legality—most crucially, perhaps, to the alleged violation of the rule of law in the sense of breaking through the constitutional law that stipulates the separation of powers of government as a fundamental principle.

Whether that focus will hinder or help the republic in its necessary attempts to provide for the common defense remains to be seen. The contrasting interpretations of our constitutional crisis from which I began my discussion ultimately come to rest on differing senses of what kind of state exists naturally among sovereign polities, and what kind of challenge

communism presents to the United States, and, more generally, to what once was proudly called "the free world."

In 1946, Sir Winston Churchill, in the most famous speech he gave in America, coined the vivid phrase "cold war" to characterize the relations between the Soviet Union and the western democracies. It was, in Churchill's judgment, truly a war, although for the time being, fortunately, only a "cold" war between regimes activated by the root principles of communism and liberal democracy. But in recent times, that very phrase has stirred up great controversy. Some argue that it is the outmoded and dangerous rhetoric of "cold warriors," foremost among them President Reagan, who once dared to call the Soviet Union an "evil empire." Others argue that it still accurately captures the sense of the most fundamental political conflict of our time, and that the president's basic foreign policy is intended to facilitate the defense of liberal democracy in the world.

It has not been my purpose, here, to make a simple judgment on the merits of these opposing interpretations of our present condition. It was, rather, to try to show that they have a common root in a problem that the Founding Fathers grasped with remarkable clarity. That problem is, in essence, whether adherence simply to the rule of law is an adequate guide in the conduct of foreign relations, or whether, instead, such rule must be joined to and supplemented by the rule of practical wisdom. It is perhaps providential that the Iran-Contra crisis should cast up that old problem in a particularly poignant and challenging form just as we are in the midst of our celebration of the bicentennial of our Constitution.

ENDNOTES

1. Alexander Hamilton, James Madison, and John Jay, *The Federalist*. No. 25, para. 10. Throughout the essay, passages are cited by essay number and paragraph to facilitate the reader's use of any standard edition of the text.
2. *See* Aristotle, *Politics*, 1286a7-1288b32.
3. These general principles are articulated in the Declaration of Independence, and, more profoundly, in John Locke, *Second Treatise of Government*.
4. The *Washington Post*, December 8, 1986, sec. A, p. 15.
5. "Talk of the Town," The *New Yorker* (December 22, 1986): 23-24.
6. Douglas A. Jeffrey, "The Iran-*Contra* Affair and the Real Crisis of American Government," *The Claremont Review* (Spring 1987): 3-9.
7. Whether Socrates seriously expects such a rule ever to occur in reality is doubtful. For a thoughtful discussion, *see* Leo Strauss, "On Plato's Republic," *The City and Man* (Chicago: The University of Chicago Press, 1964) p. 50-138.

SUGGESTED READINGS

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APPENDIX

ANALYTICAL OUTLINE OF *THE FEDERALIST*, No. 67-77
(Author, Alexander Hamilton)

The Nature of the Executive Power

Part I: On Presidency and Monarchy. Nos. 67-69.

- A. Polemic against critics who speciously liken the two. No. 67.
- B. Praise of mode of election. No. 68.
- C. Analysis and comparison of powers of President and English Monarch. No. 69.

Part II: On Presidency and Republican Government. Nos. 70-77.

- A. Considered predominantly under the aspect of the principle of "energetic government." No. 70-77, para. 10.
  1. Positing of the "necessity" of "an energetic executive" for "good government." No. 70, paras. 1-2.
  2. The problem: How to combine "ingredients" of "energy" with those of "safety." No. 70, paras. 3-5.
  3. Detailed analysis and justification of the "ingredients" of "energy." No. 70, para. 6—No. 77, para. 11.
     - a. Unity. No. 70, paras. 6-23.
     - b. Duration. Nos. 71-72.
     - c. Adequate compensation. No. 73, paras. 1-2.
     - d. Competent powers. No. 73, para. 3—No. 77, para. 10.
- B. Considered predominantly under the aspect of the principle of "republican safety" ("due dependence on the people"/"due responsibility"). No. 77, para. 11.

ANALYTICAL OUTLINE OF *THE FEDERALIST*, NOS. 47-51
(Author, James Madison)

The Separation of Powers

Part I: On the Nature of the Separation of Powers. No. 47.

A. Introduction. Paras. 1-3.

The political "maxim"—or fundamental truth—that underlies the separation of powers; the concentration of all the powers of government, legislative, executive, and judicial in one set of hands is "the very definition of tyranny."

B. An Inquiry into Montesquieu. Paras. 4-8.

1. French philosopher Montesquieu is the chief teacher of this maxim.
2. Montesquieu bases his argument on the "liberty" that results from the application of the "maxim," and perceives its operation in the British Constitution.
3. Montesquieu shows that an *absolute* separation is neither possible nor desirable, and that only the *total* accumulation of all power in one set of hands leads to "tyranny."

C. An Inquiry into the State Constitutions. Paras. 9-21.

1. The various provisions for "separation of powers."
2. State constitutions do not provide for *absolute* separation of the three branches.

Part II: On the Means to Preserve the Separation of Powers. Nos. 48-51.

A. Constitutional Delimitations of Each Branch. No. 49.

1. General nature of the problem. Paras. 1-6.
   a. Power tends to "encroach," hence is in need of practical constraints.
   b. Legislative tends to be more prone and more able to encroach, hence most in need of constraints.
2. Examples from two state constitutions. Paras. 7-14.
   a. Virginia: Jefferson's observations.
   b. Pennsylvania: Madison's observations.
3. Conclusion: "mere demarcation" of powers not sufficient to prevent "tyrannical concentration."

B. Appeal to the People. Nos. 49-50.

1. Occasional appeals: An inquiry into Jefferson's support of such a means. No. 49.
   a. The case for such an appeal: it places the means of checking encroachments in "the people," from whom all government power emanates. Paras. 1-3.

b. Four objections to Jefferson's proposal, showing that it is neither a proper nor effective means. Paras. 4-11.

2. Periodic appeals. No. 50.

a. General objections. Paras. 1-2.

b. Objections from the experience of Pennsylvania. Paras. 3-11.

C. Interior Structure of the Government. No. 51.

1. This means is the most effective. Para. 1.

2. Its effectiveness rests on these features:

a. Each branch has "will of its own." Para. 2.

b. Members of each branch have own income. Para. 3.

c. Members of each branch have a personal interest in maintaining independence: "ambition must be made to counteract ambition." Paras. 4-5.

d. Constitutional devices provide self-defense. Paras. 6-7.

e. Special features of federal government:

1. Power is divided (a) between federal and state governments, and (b) among three branches of federal government. Paras. 8-9.

2. Diverse interests in the society at large will check each other. Para. 10.

QUESTIONS FOR DISCUSSION

1. The Iran-Contra issue is an example of the president versus Congress in the separation and struggle for power over foreign affairs including war powers. Review Articles I and II of the U.S. Constitution. What specific powers related to foreign policy are designated for Congress, and which are granted to the president?

2. The author mentions the conflict between Congress and President Franklin D. Roosevelt over foreign policy. What issues led to similar tension during the terms of presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon?

3. In the author's analysis of selected essays from *The Federalist*, what is the significance of each of these qualities in the chief executive: (a) energy, (b) love of fame, (c) noble mind, and (d) ambition.

4. According to the author's analysis of the writings of "Publius" in *The Federalist*, what checks are provided in the Constitution that prevent executive power from encroaching on the power of Congress?

5. Which of the two interpretations of the Iran-Contra crisis presented by the author in the opening of the essay is closest to your opinion of the recent conflict between the president and Congress over the Iran-Contra issue?

Rights and Freedoms

Introduction

Enduring issues related to protection of the rights of individuals under the Constitution are the subject of the second part of the book. Each essay deals with protections that today we tend to view as static or long established. Yet, as the reader will see, our twentieth-century protections in regard to religion, criminal justice, voting rights, education, and privacy of information have evolved over time through amendment of the Constitution, changes in the law, and judicial review.

Essay four was written by Lief H. Carter, professor of political science at the University of Georgia. He reviews the separation of government and religion in the United States as established by the first phrase of the First Amendment and further defined by the Supreme Court. In his essay, he briefly reviews political history leading to the First Amendment and then demonstrates that the Court has been notably consistent in its approach to ensuring independence of government from religious beliefs. Professor Carter presented the summary of his essay in Savannah, Georgia, in the Myers Middle School Auditorium on May 28, 1986.

The fifth essay presented here was written for the initial assembly of the Constitution 200 Project, held in Decatur, Georgia, on April 3, 1986, at Agnes Scott College. For this forum, Susette M. Talarico, professor of political science at the University of Georgia, and Erika S. Fairchild, professor of political science at North Carolina State University, focused on criminal justice under the Constitution. In their essay, the authors discuss the historical background of procedural guarantees in the Bill of Rights, explain the significant extension of the protections to the states by Supreme Court interpretations of the Fourteenth Amendment, and review the key cases for each of several areas of procedural justice.

Voting rights, although left to the determination of each state by the

Constitution, became a national issue at the end of the Civil War. This is the topic of the sixth essay, written by Tony Freyer, professor of history and law at the University of Alabama. Professor Freyer traces the development of black voting rights in the South. The essay summary was presented in Montgomery, Alabama, at the new State House on September 24, 1987. Because Mr. Freyer was in England at the time, the synopsis was presented by Robert McCurly, director of the Alabama Law Institute.

Essay seven on education and the Constitution was prepared by Charles S. Bullock III, Richard B. Russell Professor of Political Science, University of Georgia. Professor Bullock traces the expansion of federal issues based on the *equal protection* clause of the Fourteenth Amendment that have arisen in major Supreme Court cases. In the author's absence, the summary was presented by South Carolina state representative Jean H. Toal at the Townhouse of Columbia, South Carolina, on May 11, 1986.

The closing essay of this reader discusses privacy rights as they relate to personal information in our era of advanced information technology. It was written by John T. Soma, professor of law, and Susan J. Oran, research associate, at the University of Denver School of Law. Professor Soma presented the essay's precis at the University of Georgia School of Law in Athens, Georgia, on October 21, 1986. The essay first explains the origins of the concept of the "right to privacy" and its development in Supreme Court rulings. The authors draw imagery from George Orwell's novel *1984*, depciting a society where electronic surveillance by government allows for no right to privacy of information. They contrast these chilling scenes with an examination of the constitutional and legal guarantees which now protect personal confidentiality and then assess the need for strengthening protections as technology advances.

ESSAY FOUR

Religion and Government: How Separate Must We Keep Them?

By Lief H. Carter

Introduction

As we prepare to celebrate the bicentennial of the United States Constitution, we discover items such as these in the news:

- The Reverend Pat Robertson, a graduate of the Yale Law School and head of the Christian Broadcasting Network, considers running for the presidency of the United States.
- Twelve-year-old Pamela Hamilton, the daughter of religiously fundamentalist parents, suffered from a football-sized tumor that would quickly kill her if surgeons did not remove it. In a juvenile court hearing, she agreed with her parents' refusal to allow the surgery. She expressed her willingness to die "when the Lord is willing to take me." The court ruled that Pamela was a "dependent and neglected child" and ordered her hospitalized. Michael Terry, the assistant state attorney who won the case, argued: "She ought to have the opportunity to form her own religious beliefs when she becomes an adult. Therefore, she should be given an opportunity to live."
- The Internal Revenue Service denied tax exempt status to Bob Jones University because that school adopted policies for religious reasons that discriminated on the basis of race. The Supreme Court upheld the IRS ruling.
- An Alabama statute authorized public schools to adopt a period of silence for "meditation or voluntary prayer." The Supreme Court struck the law down.
- The Supreme Court ruled, 5-4, that the Air Force may prohibit an Orthodox Jewish officer from wearing his yarmulke while in uniform.

- President Reagan has endorsed a constitutional amendment which reads:

> Nothing in this Constitution shall be construed to prohibit individual or group prayers in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer.

- Senator Orrin Hatch, a Utah Republican, has sponsored a "Silent School Prayer" amendment.
- In Douglas County, Georgia, in the fall of 1986, a court temporarily stopped the saying of Christian prayers before the kickoffs of the high school football games.

Each of these news stories raises controversial questions about the goodness of American life. Many people believe that religious people are "better" than nonreligious people and that our country is doomed if Americans don't share a common religious commitment. Many believe that religious training in youth instills habits of politeness and mental discipline that citizens must possess to cooperate with their friends and defend themselves against their enemies. Others disagree. All sides look to government for answers. This essay explores the ways our legal system shapes government's response to these questions.

The Constitution and the Rule of Law

One of the most widely shared beliefs about goodness in the American way of doing things holds that our policymakers must operate within the limits of law. The fundamental "rule of law" principle holds that the Constitution of the United States prevents governments from doing certain things, even things a large majority of citizens want it to do. The Constitution says in Article VI, section 2, that the Constitution is "the supreme law of the land," and we have chosen over time to treat it that way. Therefore, government decisions must operate within constitutional limits.

Note that the law of the Constitution doesn't govern everything. The *Constitution* of the United States *only governs the government*, and this fact helps clear away one of the deepest sources of confusion in the area of religion. The Constitution and the Supreme Court's interpretation of it can only affect what *public* officials may or may not do with respect to religion. It has nothing to say about private religious arrangements that the government does not influence. Thus the Constitution does *not* prohibit prayer in private schools because the government does not run them. The same applies to students in public schools being entirely free to say grace before they eat in the school cafeteria or to pray before an exam (as we see many

athletes do before the start of a sports contest). These are private religious activities, and the Constitution only comes into play when the government tries to do something about them.

Each of the examples at the beginning of this paper raised a constitutional issue because each situation did involve the government: A religious fundamentalist seeks to hold a government office. The juvenile court through the local sheriff (a governmental official) hauls Pamela Hamilton off to the hospital against her will. The Internal Revenue Service, the Air Force, the state of Alabama and Douglas County, Georgia, are units of government, too. How does the Constitution speak to each of these units of government?

The Constitution. . . only governs government, and this fact clears away one of the deepest sources of confusion in the area of religion.

The first words of the First Amendment in the Bill of Rights are: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This essay will explore the history of those particular words, but an additional fact to know in a discussion of religion and government is that Article VI, section 3, prohibits using any religious test as a qualification for holding public office. While those words aim primarily at preventing rules which *require* someone to be in some way religious in order to hold office, they would almost surely protect the opposite case as well. In combination with the First Amendment, they make a very strong case that nothing in the Constitution prevents us from electing Pat Robertson or any other minister or evangelist to the presidency. The Court, in fact, nullified a Tennessee law that prohibited members of the clergy from holding elective public office.

The Supreme Court and the Constitution

You have probably heard the expression (used by a chief justice of the Supreme Court) that the Constitution means what the Supreme Court says it means. This statement has been true throughout our history, and the bulk of this paper will assess what the Supreme Court has said about the meaning of the words of the First Amendment I quoted in the last section. But first we must dispose of a basic question. It seems somehow shocking or immoral for the Constitution to mean only what the Supreme Court says it does. Aren't the words clear? Weren't the Framers' intentions clear? The

Constitution may mean what the Court says, but is this pattern democratic? The justices receive appointments for life and face only the threat of impeachment. Despite these concerns, I think this pattern *is* democratic for four separate reasons:

1. Both the words of the Constitution and the intent of the majority who voted the Constitution into law are, for better or worse, very ambiguous and uncertain. Somebody has to decide what the words mean in the context of the times during which they were written.
2. Article III of the Constitution gives the courts power ("jurisdiction" is the technical term) to decide cases "arising under the Constitution." Any person who decides a case under any set of rules inevitably must decide what the rules mean. In our common-law system, appellate judges write opinions explaining and justifying why they think the law means one thing rather than another. Therefore, having the Court say what the law means seems built into the fundamental structure of our legal system.
3. The Supreme Court has decided what the Constitution means for almost 200 years, and we don't seem crippled as a nation. This is not, of course, to say that the Court has always decided well. Sometimes the Court has reasoned so badly that nearly everyone agrees the result was a disaster. The *Dred Scott* decision (1857) was an example. The Court ruled against the plaintiff, Dred Scott, a former slave living in the free territory of Wisconsin. The Compromise of 1820 had made slavery there illegal, yet when Scott sued for his freedom, the Court ruled that no slave, or descendent of slaves, was in fact a citizen. That decision's tortured reasoning helped start the Civil War. But still, the question of whether the Court's decisions are good differs from that of whether the Court should make them at all.
4. If we believe the Constitution places powerful legal and moral limitations on the conduct of government, much can be said for setting aside a unit of politically independent people to concentrate on the job of interpreting the words of the document. Legislators and executives get too caught up in the press of lobbying and campaigning to focus on long-term philosophical questions. Besides, the political system, which requires that appointment to the Supreme Court have both the presidential nomination and Senate approval, is sensitive enough to ensure that the unelected justice remains fairly close to the wishes of the people.

The Supreme Court and Religion

The cases I described above, which fall within the religion clauses of the Constitution, threaten to confuse the legally uninitiated person right from the beginning. The words say, "Congress shall make no law. . . ." How do these constitutional words govern the Internal Revenue Service, or a local sheriff, or a president, or a state legislature? The answer is, of course, that the Supreme Court has said they govern. The Court's reasons strike me as sound. The Constitution governs the Internal Revenue Service, even though it is not Congress, because the Congress created the IRS as well as most other government agencies, and authorized them to act. The First Amendment governs the executive branch, even though it is not Congress, because the executive branch executes policies which originate in the legislative branch. The religion clauses govern state governments and the local officials, like sheriffs, whose offices state governments create because (a) the Fourteenth Amendment says "No state shall. . .deprive any person of life, liberty, or property, without due process of law" and (b) due process requires standardizing across the nation the fundamental rights and freedoms we possess. In other words, it would make little sense to have the moral meaning of an American citizen's religious freedom change every time he or she traveled from one state to another.

So, in our first look at the law, we find that the Court has given nationwide meaning to whatever constitutional law of religion it declares. But now let us look at some examples of the state of the law as it stands in 1986:

- It is legal to put "In God We Trust" on our coins, and it is legal for a city to sponsor a creche on the town square at Christmas, but it is illegal to post the Ten Commandments in a public school classroom or to hold organized prayers there during class time.
- It is legal to allow citizens to take tax deductions for the contributions they make for religious purposes to their churches, but it is not legal to spend tax money which the government collects to pay teachers to teach nonreligious (secular) subjects in a church-run private school.
- It is legal for the government to punish Mormons who marry more than one wife, but it is not legal for the government to punish American Indians who use otherwise forbidden drugs in their religious rites.

Granted, in short, that the Court declares the Constitution's meaning, how could the sane and accomplished human beings who become justices produce such messy and inconsistent rulings?

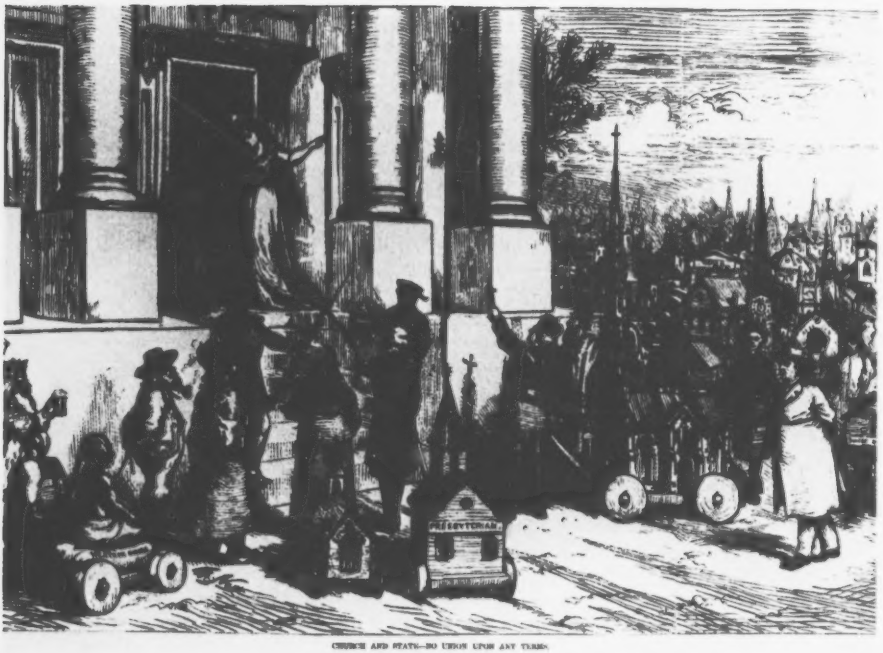
In the process of showing you how the Court has reached these results, I hope to show that the Court has created less confusing law than you might think. The law in our democratic system is not perfect or "correct." But most of the Court's decisions are more consistent than they first appear.

Before getting into the details of my argument, however, I must discuss one more critical element in the law itself, one which you may already have noticed. "Establishment of religion," which the First Amendment prohibits, refers to the process by which the government authorizes, approves of, or officially adopts one religious point of view. Historically, the clause rejected the English adoption of the Anglican Church as the official religion of the government. This clause provides the principle reason for rejecting prayer in public schools. If schools run by the government endorse one religious practice against another, the result is the same as having an official government religion. The free exercise clause, on the other hand, protects the individual's religious beliefs against infringement by government. And, the First Amendment speaks not of belief but of "exercise," something like action. Here arises a conflict built into the Constitution itself. It is precisely because a lot of people want to exercise their religion in the form of school prayer that schools run into establishment trouble. The public school teacher who wants freely to exercise his or her religion by starting class with a prayer finds that the very Constitution that gives this religious freedom through the free exercise clause takes it right back again in the establishment clause.

Colonial Precedents

The England that we divorced in 1776 had sponsored its own official state religion since Henry VIII's split from the Catholic Church of Rome. The government did not merely endorse the Anglican Church (as our states have official state birds and flowers today), it provided the church with money raised by taxation, participated in making church policy, and sanctioned official church participation in civil government. Further, despite the Act of Toleration of 1689, England continued irregularly to punish those who disagreed with the church.

All of the colonies thus began with automatically established churches (ancestors of our Episcopal churches), and some states maintained established churches on paper well into the nineteenth century. However, the debates that produced the Bill of Rights, and the political history under the Articles of Confederation, show a decisive desire to sever the church/state connection. By the 1830s, when Alexis de Tocqueville attributed the strong spirit of religion in American life to the separation of church and state, this separation seemed an accomplished fact.



CHURCH AND STATE—NO UNION UPON ANY TERMS

A cartoon by Thomas Nast in Harper's Weekly *on February 25, 1871, titled "No Union on Any Terms," supported the principle of separation of churches from government.*

But precisely what problems did these profound changes seek to solve? To answer this question we must look closely at the history of religious liberty in Virginia, for Virginians strongly shaped the First Amendment.

By the middle of the eighteenth century, Virginia contained four distinct religious movements. The Episcopal church itself had split between traditionalists and such revolutionary naturalists (called "rationalists") as Thomas Jefferson. The Baptists and the Presbyterians possessed considerable political power, though they reflected different political forces. The Presbyterians were well educated and organized to influence political events. The Baptists were more evangelical and populist. The most extreme Baptists were imprisoned for their teachings right up until the Revolution.

In the late 1770s, Thomas Jefferson drafted the Statute for Establishing Religious Freedom for the Virginia legislature's constitution. It stated that

no one is to "suffer on account of his religious opinions or beliefs." The chronology leading to the statute's final passage in 1785 is a fascinating episode in American history:

1776 Virginia legislature passes Declaration of Rights, which in part declared that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." The Hanover Presbytery, the most powerful in Virginia, complains that many of its members pay taxes to support the construction of Episcopalian churches and clergy salaries. They argue for interpreting the declaration to prevent any governmental financial aid to religion: "Arguments for establishing the Christian religion could also be pleaded for establishing the 'tenets of Mohamed.' "

1777 Hanover Presbytery petitions to release all citizens from the obligation to pay taxes "for the support of any church whatsoever." They threaten civil disobedience if the legislature persists in seeking to control religious activities.

1780 Virginia legislature permits "any minister of any society or congregation of Christians" to perform a marriage ceremony, and sets maximum fee for the ceremony at "twenty-five pounds of tabacco."

1784 After the end of the war, support for the established Episcopal church increases. The "Bill for Establishment Support for Teachers of the Christian Religion" was introduced which would make "Christianity" the "Established Religion" of Virginia, would declare the articles of faith essential to Christianity, would define the form of congregation that constituted a church, and would assess citizens an annual amount, to go either to the church they attended or to publicly supported seminaries. The Hanover Presbytery supports the bill, but it is held over until the 1785 legislature for final passage.

1785 The 1784 bill is defeated. During the interim, public opinion appears to turn strongly against the bill. The Presbyterians withdraw support as they recognize that the bill's underlying legal principle could permit substituting Episcopalianism for Christianity in the law in the future. Also, with Jefferson's and Madison's help, the leading supporter of the bill, Patrick Henry, was elected governor and thus removed from the legislature at final debate. Jefferson's bill, which he had introduced as chairman of the Religion Committee in 1779, is revived and passed instead, supported by a coalition of Baptists, Presbyterians, and rationalists. With an eye to the upcoming 1785 session, Madison wrote and distributed his Memorial and Remonstrance on religion. In it he stated:

> The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to *exercise* it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the *opinions* of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men. It is unalienable also; because what is here a right towards men, is a duty toward the Creator. It is the duty of every man to render to the Creator such *homage* and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.

This outcome rings out for religious toleration about as clearly as the political process can on controversial matters. The critical passage in Jefferson's bill, which Jefferson later explained should extend to protect "Jews, Mohammedans, Hindoos and infidels [atheists]" holds

> that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or furthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

The Virginia philosophy fed directly the wording of the Constitution's First Amendment, so we can now identify the problems that concerned the writers of those words: (a) use of the governmental power to tax to provide aid to religious organizations and activities; (b) use of government power to decide what does or doesn't qualify as a religious belief; (c) use of government power to punish, harass, or in any way harm a person because of his (and nowadays her) religious opinions; and (d) impairment by government of a citizen's dignity to think what they wish.

You may have noted an important limitation in this history. The Founding Fathers actively sought to protect opinion and belief, but they distinguished opinion and belief from action, and they were not inclined to give

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The Founding Fathers actively sought to protect opinion and belief, but they distinguished opinion and belief from action.

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special legal protection to those who, in the name of religion, violated secular laws. We thus have much stronger historical support for the ban on prayer in public schools than we have for the exemption that the Court granted Amish children from their obligation to attend school. But this only brings us back to the First Amendment dilemma. Exercise *is* action, not just belief. Madison, Jefferson, and their kin never satisfactorily addressed the need for some positive governmental protection of actions, not just opinions, in order to protect free exercise. Where establishment is concerned, it would seem God and government must stay far apart, but free exercise may have to bring them closer together.

The Modern First Amendment

Until the 1940s, when the Supreme Court declared that the religion clauses of the First Amendment bound the states through the due process clause of the Fourteenth Amendment, the religion clauses generated relatively little federal litigation, and not much doctrine. In 1899, the Supreme Court upheld a congressional appropriation of monies to a hospital managed by nuns because the hospital did not admit or treat patients on the basis of religion. In the 1920s, the Court also upheld a Louisiana law that supplied secular textbooks to church-related schools with public money. These cases are all but forgotten today. The most ringing endorsement of the Founding Fathers' principles actually came from the Supreme Court of Illinois in 1910. In *People ex rel Ring et al. v. Board of Education*, this court ruled against the practice of Bible reading, hymn singing, and recitations of the Lord's Prayer in public schools. It stated:

> The exclusion of a pupil from this part of school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain pupils must be excused from it because it is hostile to their or their parents' religious beliefs, then such instruction or exercise is sectarian and forbidden by the [Illinois] constitution.

The modern First Amendment religion clauses really began to take shape in 1947, when the Court approved using taxpayer money to allow children free transportation to parochial schools in *Everson v. Board of Education*. In the process, the Court held that the establishment clause did bind the states. But the decision was 5-4, and in 1948 in *McCollum v. Board of Education*, the Court declared it unconstitutional to permit students to attend

Some public schools have been used on Sundays for religious services. This photo was taken in 1943 in a one-room school in Maine.

religious doctrine classes on school property during school hours. Bible classes *off campus* during school hours are, however, constitutional (*Zorach v. Clauson* (1952)).

While the distinction between these cases is a fine one, it does exist. Beginning with these cases, the Court has focused primarily on the psychological coerciveness of the governmental action on religious belief and opinion. The student who receives free transportation to school, or free secular textbooks, does not experience direct pressure from the government to believe one thing rather than another. But, singling out and differentiating those participating in certain religious practices from those not participating in those practices on school property has precisely the negative effect the Illinois court described in 1910.

Thus we come to the school prayer cases. Decided in 1962 and 1963, the Court prohibited all religious devotions in public schools (*Engel v. Vitale*

(1962); *Abington v. Schempp* and *Murray v. Curlett* (1963)). Over Justice Stewart's dissent, the majority stressed the youthfulness and impressionability of school children, and the possible conflicts between school and family beliefs. The age and impressionability factor seems especially important in light of the Court's decisions in the 1970s upholding noncategorical federal grants to accredited private colleges with church affiliations.

Today, the Court attempts to fine tune this basic doctrine of separation of church and state. To this end, it declared a comprehensive test in *Lemon v. Kurtzman* (1971): Government aid to religious groups can stand only if (a) it has a secular purpose; (b) its primary effect or consequence neither helps nor hurts religion; and (c) the policy does not entangle government officials excessively in the administration of religious activities. Since 1971, the cases continue to decide which government practices pass this test, and which fail. Thus, the government may fund secular textbooks, standardized testing materials and the like for church schools, but not the purchase of tape recorders. Teachers can use a tape recorder to aid religious instruction, but they can't use a secular textbook that way. To restrict the use of the tape recorders to secular activities would entangle bureaucrats excessively in school administration.

But what of the free exercise clause? While the establishment cases seem today remarkably consistent with the general philosophy of the Founders, the free exercise clause has embraced the protection of action as well as belief in a way the Founders did not imagine. The Supreme Court has exempted Jehovah's Witnesses from an obligation to salute the flag and from the requirement to obtain a license prior to selling and distributing literature door-to-door. Amish children and their parents won exemption from truancy laws in *Wisconsin v. Yoder* (1972). And the Court has required states to provide unemployment benefits to orthodox Jews who refuse to

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Today, the Court attempts to fine tune the basic doctrine of separation of church and state.

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take job openings that require working on their Sabbath. In the conscientious objection draft cases during the Vietnam War, the Court allowed men who professed only deep philosophical objections to war and who professed no specific religion at all to claim alternative service.

On the other hand, the courts have not permitted Mormons to marry bigamously, and they have upheld "blue laws" requiring the cessation of

some forms of commercial activities on Sundays because these policies serve a valid secular purpose. Thus, a legal distinction between protecting belief and protecting religious action still has some life in it. However, the Court has never fully faced up to the fact that its protection of the religious freedoms of these minorities is just a shade away from assisting religions in the way the Virginia founders resisted.

Current Problems in the Law of Religion

Seen against the history of Western civilization, with its continuous stories of religious bigotry, the degree of toleration in the United States in the twentieth century seems indeed remarkable to me. In my adult lifetime, we have elected a Catholic, a quasi-Quaker, and a Southern Baptist to the presidency. This is a far cry from the age when schismatic Catholics slaughtered one another. The Founders' vision of the governmental arrangements that could foster religious toleration seems to have come true, at least for now. While we might attribute this result to a general decline in the importance of religion in the modern, high-technology life-style, I think the Founders' vision and the legal process that has kept it alive deserve considerable credit. After all, the progress toward reducing racial bigotry seems equally real.

In this last section, I shall point out some continuing problems in the Supreme Court's work and draw conclusions from them about the constitutional process.

Problem One: Consistency among Cases

Recall the *Lemon* test, which distinguishes permissible from impermissible government aid to religious organizations. The second of the three requirements prohibits policies whose primary *effect* benefits religion; even if the primary *purpose* is secular. Now consider a Minnesota statute which allows parents of school children to deduct from their state income taxes their expenses for tuition, textbooks, and transportation for their children to attend either public or private schools. The undoubted primary effect of this law, as its legislative history suggested, was to allow deductions for tuition to religiously private schools. Over 90 percent of Minnesota's private school students attended religiously affiliated schools, and tuition is their biggest expense by far. Yet, in a close, 5-4 vote, the Court's majority opinion (by Justice Rehnquist) upheld the law under the *Lemon* test (*Mueller v. Allen*, 463 U.S. 388, 1983).

We might conclude that the Court will not look behind the surface of a statute. If on its face it potentially benefits everyone regardless of religion, then a policy (here Minnesota's tax-deduction policy) passes constitutional

Prayer is a daily routine in many private schools

muster. But this reasoning overlooks the fact that *Lemon* means the opposite. Otherwise why look at beneficial effect separately from secular purpose at all? But if we overlook this inconsistency, how then do we contend with the majority's ruling striking down Alabama's moment of silence law? This law on its face endorsed no religion at all, yet here the Court *did* look behind the scenes. When it did, it found the statute was part of a scheme to get God back into the schools and struck it down in *Wallace v. Jaffree* (1985).

The same problem plagues the Court's ruling upholding the practice in Pawtucket, Rhode Island, which each year had erected a creche in downtown at its own expense—about $20.00. This innocuous practice, which could be justified on the same secular grounds as the blue laws, passed the *Lemon* tests. Unfortunately, the first of these tests requires a secular purpose, yet the mayor of Pawtucket testified at the trial that the purpose of the creche was religious, "to keep Christ in Christmas" (*Lynch v. Donnelly* [1984]). The Burger Court's application of the *Lemon* test in practice is full of serious inconsistencies.

Problem Two: Doubtful Economic Logic

National tax laws allow taxpayers to take income tax deductions for their contributions to some organizations but not others. Churches qualify as one such "charitable" organization. However, economically there is no

difference between a tax deduction and government aid, and direct government aid to churches clearly violates the separation doctrine. Even more dubious is the grant of property tax exemptions under state and local law directly to churches. Not all charitable organizations get such deductions, but churches *as churches* do. The Supreme Court has never come close to providing a logical explanation for these anomalies. Indeed, the Court has never persuasively addressed a very obvious fact about money itself: it is fungible. If someone tells me they will pay me $10,000 a year to help me send my children to college, then assuming I will send them one way or another, I have for all practical purposes received $10,000 more to spend on cigarettes, whiskey, and wild women, for I suddenly have to find $10,000 less for college. When the Court approves aid for secular purposes, like textbooks, the religious organization that receives the money has more to spend on religious activities.

Problem Three: The Place of History in Constitutional Lawmaking

We have seen that the Court's development of separation doctrine fits the expectations of at least some prominent Founders, but that the free exercise rulings doctrine does not. The Court selectively reads political and legal history, it would seem. Even within the separation doctrine, the Court reads selectively. Recall the bill that almost passed the Virginia legislature in 1784. It sought to provide public money to aid seminaries, and it raised a storm of protest. Yet, the Supreme Court today permits aid to sectarian colleges and universities because students are not so impressionable at that age.

Conclusion

I would have to turn this essay into a treatise on constitutional law to verify the points I am about to make. You will have to take their sincerity on faith. The three problems I have just noted—inconsistency, faulty economic logic, and selective readings of history—mark *all* the work of the Court throughout its nearly two centuries. This fact bothers some law professors a great deal. As a political scientist, however, I am inclined to explain the pattern more positively. The Court *is* a politically responsive body. Like any political body, it has to operate pragmatically to survive. The Court balances the Bill of Rights' command prohibiting tyranny of majorities against the claims of citizens for goodness, including religious goodness, in their lives. The inconsistencies inevitably arise when nine people, all with egos large enough to get them on the Court in the first place, jockey and negotiate to find their agendas for public goodness in the Constitution. John Marshall, our first great chief justice, did so, and so it shall continue.

Thus, a fair summary of the Court's rulings over the years might run like this: As long as a religious interest does not threaten public morality much or involve a lot of money, the religious interest usually wins. Bigamy and racial bias seem unquestionably immoral, therefore the Mormons lost and so did Bob Jones University. But the Amish desire to keep children out of formal schools and the traditional Indian use of hallucinatory drugs don't seem immoral. Something about the ancient nature of these practices validates them, and the Court upholds them.

On the other hand, the Court is reluctant to upset economic arrangements where a lot of money is involved. It has ruled that employed Amish cannot legally refuse to have social security taxes withheld from their paychecks,

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As long as a religious interest does not threaten public morality much or involve a lot of money, the religious interest usually wins.

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even though the same religious beliefs influence Amish views on both schooling and taxpaying. And the Court seems quite unwilling to change the tax-exempt status of churches, since doing so would have a major impact on all church budgets.

I hope this conclusion does not sound cynical. From my political science perspective, the Court really has no viable alternative. It cannot interpret the Constitution through a simple-minded application of the Founders' intent, because it, and we, can't know what they intended. We do know what a few influential men said in the heat of political battle 200 years ago, but the arguments of these few do not necessarily reflect the intent of the majority of state legislators who ratified the entire Constitution. And we can't know what Jefferson and Madison would think today if they understood the nature of our society, so vastly different from theirs. Furthermore, the Court can't interpret the bare words of the Constitution; they are too vague, general, and ambiguous. Finally, the Court cannot rigidly follow its own precedents because strict *stare decisis* would transform old and perhaps outdated judicial opinions into *de facto* constitutional amendments.*

So, the Court has no alternative but to struggle constantly to harmonize words and legal history with the evident facts of modern life. No doctrine

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**Stare decisis* is the principle of applying a previous court decision to another case with similar facts; *de facto* is exercising power as if it is legally constituted.

will ever neatly resolve all cases. I still have trouble deciding about Pamela Hamilton.

I do believe that the Court could have avoided many of the inconsistencies in the law as it stands at the Bicentennial. The Burger Court seemed too often to content itself with clever legalistic distinctions that insult those readers who look to the Court for clear moral guidance. But if you go back to the inconsistent cases I noted near the beginning of this essay, I think you will find that one principle does bring some order out of the apparent modern chaos. The principle holds that government must avoid, if at all possible, policies that pressure, coerce, or interfere in any way with a person's religious conscience or opinion. The "In God We Trust" on the coins in my pocket does not influence my religious beliefs. But prayers and religious symbols in the classroom could have shaped my opinions as a child. I would feel more coercion if my tax money went to parochial schools than I would if, by choosing to send my children to free public schools, I lose a tuition tax deduction. I have some freedom to choose in the latter case, but not in the former. In a pluralist society, ensuring the independence of religious belief from government influence may be the only way to avoid the evils of religious bigotry. We should therefore approach a school prayer constitutional amendment very cautiously and skeptically. It is remarkable that Jefferson and Madison thought much the same way 200 years ago.

SUMMARIES OF CASES

Major U.S. Supreme Court Religion Decisions Since 1946

Everson v. Board of Education, 330 U.S. 1, 1947.

A New Jersey statute authorizes local school districts to make rules and contracts for the transportation of children to and from schools. The Ewing Board of Education authorized reimbursement of the costs for bus transportation of children using the regular public transportation system. This included the costs of transporting some children to Catholic parochial schools where regular religious instruction took place as well as secular education. Arch R. Everson, as a taxpayer, filed suit challenging the right of the board to reimburse parents of parochial school students. The Supreme Court held: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Nondiscriminatory aid by the states to religion was disallowed as a violation of the Establishment Clause of the First Amendment, but free transportation was upheld because it went to students, not to religion.

McCollum v. Board of Education, 333 U.S. 203, 1948.

Vashti McCollum, a taxpayer and parent of a child attending Champaign County, Illinois, schools, sued the school board to prohibit religious instruction in public

school buildings. Students in the Champaign County schools were released temporarily from secular study on the condition they attended religious classes conducted in the public school building. The Supreme Court ruled that this constituted a utilization of a tax-established and tax-supported public system to aid religious groups in spreading their faith. This violated the Establishment Clause. The state's tax-supported public school buildings could not be used for dissemination of religious doctrines, nor could the state's compulsory education system help provide students for religious classes of sectarian groups.

Engel v. Vitale, 370 U.S. 421, 1962.

Stephen Engel, along with other parents of public school pupils in New York, brought suit to discontinue the use in public schools of an official prayer which was contrary to the beliefs, religions, or religious practice of themselves and their children. The Supreme Court held that New York's program of daily classroom invocation of God's blessings as prescribed in prayer promulgated by its board of regents is a "religious activity." Consequently, the use of the public school system to encourage recitation of such a prayer violates the Establishment Clause.

Abington v. Schempp and *Murray v. Curlett*, 374 U.S. 203, 1963.

The Commonwealth of Pennsylvania required by law that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." A child could be dismissed from the activity upon written request of his parents. Edward Lewis Schempp, his wife Sidney, and two of their children brought suit challenging the violation of their rights under the Fourteenth Amendment. Their children, Roger and Donna, attended Abington High School, where the Bible was read every morning just prior to the salute to the flag. As members of the Unitarian Church, they disagreed with some of the readings. Schempp elected not to ask for his children's exclusion of the activities for fear they would be labeled "oddballs" by teachers and classmates.

Madalyn Murray and her son William J. Murray, III, both avowed atheists, protested the reading of a chapter of the Bible at William's Baltimore school. This practice took place in accordance with a Maryland statute. The Supreme Court ruled that both statutes violated the Establishment Clause as obligatory in nature, citing attendance at school as compulsory.

Lemon v. Kurtzman, 403 U.S. 602, 1971.

The Commonwealth of Pennsylvania passed a statute authorizing the state superintendent of public instruction, David Kurtzman, to issue state funds to reimburse nonpublic schools for the cost of secular educational services such as teachers' salaries, textbooks, and instructional materials. Numerous restrictions forbade reimbursement for nonsecular activities. The funds for this program were raised from a tax on racetrack tickets. Mr. Lemon, a citizen, a taxpayer, and the parent of a child in Pennsylvania public schools brought suit claiming that his taxes should not go to aid religious organizations. He alleged

he paid the tax specifically by buying a racetrack ticket. The Court ruled that monitoring of this statute created excessive entanglement between church and state violating the Establishment Clause.

Wisconsin v. Yoder, 406 U.S. 205, 1972.

Jonas Yoder and other Amish parents were found guilty of violating Wisconsin's compulsory education law requiring parents to cause their children who have completed the eighth grade to attend formal high school until age 16. The Amish argued that their longstanding culture and religion would be endangered by compliance with the law. The Supreme Court held that the First and Fourteenth amendments prevented a state from compelling the Amish parents to send their children to high school.

Bob Jones University v. United States, 103 S. Ct. 2017, 1983.

Bob Jones University sought refund of federal unemployment tax payments after its tax-exempt status had been denied by the Internal Revenue Service because of its racially discriminatory admissions policy. The Supreme Court held that nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code.

Mueller v. Allen, 463 U.S. 388, 1983.

A Minnesota statute allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks, and transportation" for sending their children to elementary or secondary schools. Van D. Mueller and other Minnesota taxpayers brought suit against Minnesota's Collector of Revenue, Clyde Allen, for allowing this deduction to parents of children attending parochial schools, claiming this practice was unconstitutional. The Supreme Court held that the Minnesota statute did not violate the establishment clause by providing financial assistance to sectarian institutions.

Lynch v. Donnelly, 465 U.S. 688, 1984.

The city of Pawtucket, Rhode Island, annually erects a Christmas display in a park owned by a nonprofit organization and located in the heart of the city's shopping district. The display includes, in addition to such objects as a Santa Claus house, a Christmas tree, and a banner that reads "Season's Greetings," a creche or Nativity scene has been part of this annual display for 40 years or more. Pawtucket residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself, brought an action challenging the inclusion of the creche on the ground that it violated the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The Supreme Court held that the city's inclusion of the creche in its annual Christmas display does not violate the First Amendment's Establishment Clause. The Court found that the city had a secular purpose for including the creche, celebrating the holiday recognized by Congress and national tradition, and depicting the origins of the holiday, and had

not impermissably advanced religion or created an entanglement between religion and government.

Wallace v. Jaffree, 105 S.Ct. 2479, 1985.

In 1981, the Alabama legislature enacted a statute authorizing a one-minute period of silence "for meditation or voluntary prayer" in public schools at the beginning of each school day. Ishmael Jaffree, a parent of three children in Alabama public schools, filed suit against various Alabama officials challenging this practice. The Supreme Court held that the state's authorization of a daily period of silence in public schools for meditation or voluntary prayer, was an endorsement of religion lacking any clear secular purpose, and consequently, violating the Establishment Clause of the First Amendment.

QUESTIONS FOR DISCUSSION

1. What does the Constitution state about religion? What reasons does the author give for his arguments that the Supreme Court must define the meaning of these statements in the Constitution?
2. What kinds of conflicts arise between the "establishment" clause and the "free exercise" clause in the First Amendment in regard to religious freedom?
3. The First Amendment was greatly influenced by Virginia's political leaders. How had Virginians dealt with the issue of religious freedom in their legislature in the decade before the Constitutional Convention?
4. How have Supreme Court cases since the mid-forties further defined the "establishment" and "free exercise" clauses? What criteria for the separation of church and state were set down in the case of *Lemon v. Kurtzman?*
5. Three problems in the Court's review of cases are highlighted by the author. Which of these problems do you consider to be the greatest threat to religious freedom?

ESSAY FIVE

Crime, Justice, and the Constitution

By Susette M. Talarico and Erika S. Fairchild

Introduction

Would the Bill of Rights be ratified if it were presented to the American public today? Would the various provisions of the Bill—freedom of speech, freedom of religion, protection against unreasonable searches and seizures, among others—be considered too radical for our times? Although no definitive answer can be given to these questions, there seems little doubt that the Bill would at least be controversial if submitted for popular referendum today.

Among the most controversial of the Bill of Rights' provisions are those dealing with criminal procedure, provisions intended to provide certain protections to those accused of crime. These protections, such as the right to an attorney, the right to remain silent in the presence of one's accusers, and the right to a trial by jury, are meant to ensure that the accused should not be deprived, in the Article V words of the Bill, "of life, liberty, or property without due process of law."

But why are these criminal-procedure provisions of the Bill so controversial? Why should fairness to a person accused of committing a crime even be open to question, let alone serious controversy? The Alday affair (summarized at the end of this chapter) provides a case in point. In December 1985, the convictions of three killers were set aside after a long appeals process. A new trial was ordered for three men who, 13 years earlier, had brutally murdered six members of the Alday family in Seminole County, Georgia. But it was not reasonable doubt as to the killers' guilt that spurred the legal battle to win them a new trial; they had often bragged about their deeds. Nor did new evidence appear that mandated a reconsideration of the case. Instead, the judges ruled that widespread and intensive pretrial publicity had made a fair trial for the defendants impossible. When this kind of thing happens, many people wonder who is being served by criminal

procedure—cold-blooded killers or their victims. Many wonder whether it may be time to reconsider due process protections.

Strong contemporary law and order concerns such as these have brought into question the validity of the constitutional principles regarding criminal procedure that were considered so important to the Founding Fathers. There is little appreciation, however, of the historical roots of our procedural justice guarantees or of the problems they were designed to address. To better understand the meaning of the Constitution, we will review these historical roots. Specifically, we shall assess crime and justice in colonial America and the Founders' decision to include certain provisions in the Bill of Rights.

Crime and Justice in Colonial America

In colonial, revolutionary, and post-revolutionary America, law and order concerns focused on civil disorder and rebellion. It was a period when groups of citizens knowingly and deliberately broke the law and took up arms against political authority. To be sure, crime as we know it today existed in the colonies and in the new republic. Homicide, theft, robbery, and moral offenses were treated in the common law and enforced by local courts. Estimates of the extensiveness of crime in colonial and revolutionary America vary, largely because archival records are limited, but historians have noted some discernible trends. Bradley Chapin, for example, argues that "the most important conclusion that can be drawn about crime in all jurisdictions in America before 1600 is that there was very little of it."[1] Chapin attributes this to a variety of social conditions, such as small populations, a family-centered society, little unemployment, and little conspicuous wealth.

By the eighteenth century however, according to Samuel Walker, "crime, disorder, and deviance were indeed serious problems—at least as perceived by the colonists themselves."[2] Historians emphasize that estimates of the seriousness of particular offenses vary across time, and across jurisdictions. In scrutinizing records in South Carolina and Massachusetts, for example, Michael Hindus discovered that in the 1700s assaults dominated court dockets in South Carolina, while crimes against morality captured the attention of colonial Massachusetts.[3]

Prior to and at the time of the Revolution, much of what we would consider crime today (mob violence, harassment of governmental authority, and eventually rebellion itself) was accepted by a considerable portion of the population. Such behavior was not only tolerated but occurred frequently. Richard Maxwell Brown, for example, notes that there were 45 riots in the colonies between 1760 and 1775.[4] Most of these involved some demonstration against British authority. Similarly, Samuel Walker points out that other acts of violence were also tolerated and extensive. A prime example was the tarring and feathering of Tory sympathizers. Walker argues

that these acts of violence were not committed by social outcasts or common criminals, but by "well-organized social clubs and political factions."[5]

Though crime and civil disorder were issues of significance to many colonists and citizens in the first 200 years of our history, the criminal justice system itself was quite limited. Local courts handled the cases of crime that did occur. As described by sociologist Kai Erikson, local communities sought out and dealt with criminal offenders in one of two ways: conventional penalties or banishment.[6] Though colonial criminal codes were not as severe as the common law brought from England (English law, for example, specified a considerable number of capital offenses), local communities sometimes responded in different ways to similar offenses. Chapin points out that sharp differences could be observed for crimes of misconduct, while most communities treated common offenses against person and property in similar fashion.[7]

By the time of the Revolution, two patterns related to crime and criminal justice were evident. Americans had developed a strong sense of individual rights and, simultaneously, a tolerance for acts of public violence justified by political conviction.[8] The former evolved from the common law notion of rule of law and from the American suspicion of monarchical authority. The latter reflected a peculiar response to what we would consider crime today. While common acts of violence, property offenses, and moral censure were incorporated in colonial criminal codes, violent action against British authority or Tory supporters frequently met with popular approval. This combination of faith in the rule of law and tolerance for a frontierlike violence combined to produce what Samuel Walker calls the uniquely American, popular justice. As we shall see, it complicates understanding of constitutional provisions related to crime and criminal justice.

Constitutional Provisions Related to Crime and Criminal Justice

The Emphasis on Treason

The main body of the Constitution contains few references to crime or criminal justice. Treason is the only offense specifically defined. This emphasis on treason reflected the Founders' serious concern over the potential use of criminal law to suppress political opposition. In the common law, treason was defined as a "catch-all" offense. As legal historian Lawrence Friedman points out, "it was treason to levy war on the kingdom; it was treason to violate the King's unmarried eldest daughter. It was treason to alter or clip coins; or to color any silver current coin. . .to make or resemble a gold one."[9] In the only criminal prohibition included in the Constitution, treason was a very specific and limited offense. Though of substan-

tial consequence, the authors of the Constitution emphasized that it was to consist "*only* in levying War against (the United States), or in adhering to their Enemies, giving them Aid and Comfort." Additionally, the Constitution specified that no person could be convicted of treason without the testimony of at least two witnesses to the overt action.

The Founders were concerned with procedural protections, those rights that protect individuals from the arbitrary exercise of governmental power. This concern stemmed, no doubt, from the fact that in English history and in the colonial experience criminal law was frequently used to silence political opposition. Colonial courts were instruments of judicial and executive power, as the royal governors often dominated their proceedings and as efforts to squash colonial criticism of British authority prevailed in many of those tribunals. In these forums, justice was frequently applied with little regard for basic common-law procedures. To the Founders, the two most critical procedural guarantees consisted of the writ of habeas corpus and the right to trial by jury. The "great writ" guaranteed that citizens would not be detained without charge, and the jury functioned as a potentially important and independent check against the abuse of judicial and executive authority.

Limiting Government's Power: The Bill of Rights

Additional procedural guarantees and the Constitution's most extensive consideration of crime and criminal justice were spelled out in the first 10 amendments to the Constitution, the Bill of Rights. Proposed, in part, as a political compromise to ensure passage of the Constitution, the Bill of Rights contained many of the procedural guarantees already defined in common law and specified in many state constitutions. In many respects, the federal Bill of Rights can be considered a distillation of provisions in several state constitutions.

The Bill of Rights was designed to check the power of the federal government. As evidenced by the records of the First Congress and as emphasized in Marshall's famous opinion in the 1833 decision, *Barron v. Baltimore*, the Founders were unanimous in the opinion that individual liberty was most threatened by the national government. Specifically, they worried that federal, and not state, authorities would threaten the basic civil liberties of free speech, press, assembly, and religion. Additionally and equally important, they feared that federal authorities would abuse the criminal law in expansive search and seizures and in illegitimate detentions.

With the exception of the uniquely American emphasis on civil liberties in the First Amendment, procedural justice—or restraint on the government's exercise of authority—dominates the Bill of Rights. Of particular consequence to criminal justice are the Fourth, Fifth, Sixth, and Eighth amendments.

The Fourth Amendment prohibits unreasonable search and seizure, and describes the requirements for the issuance of warrants. In this provision, the Founders reacted to the detested writs of assistance, the general search warrants issued in England and in the colonies under royal authority. These writs were loathed by colonists who engaged in smuggling, but they were especially detested because they were also frequently used to hassle and weed out political opponents.

The Fifth Amendment contains a variety of pretrial and trial provisions. These include the provision regarding grand jury indictment, the ban on double jeopardy, the privilege against self-incrimination, and general due process.

The Founders were concerned with procedural protections. . . [to] protect individuals from the arbitrary exercise of governmental power.

The Sixth Amendment focuses on trial procedures, requiring speedy and public trials, impartial juries, confrontation of witnesses, compulsory process, and the assistance of lawyers. The provision regarding impartial juries specifies that the trial shall take place in the district of the crime and that the defendant shall be informed of the accusation. Compulsory process, the constitutional provision that was at issue in the Watergate-related trials and the famous Nixon tapes, ensures that witnesses favorable to the defendant will be required to testify and that information favorable to the defendant will be used. The Eighth Amendment simply prohibits excessive bail and fines and cruel and unusual punishment.

Procedural Justice Emphasized

The emphasis on procedural justice in the amendments suggests that the Founding Fathers were mainly concerned about individual rights and had little interest in law and order issues. This is not entirely correct. As previously mentioned, they were substantially concerned about civil disorder. The disturbances of 1786 such as Shay's Rebellion in Massachusetts and other demonstrations in the Northeast where debtors sought relief must have been on the minds of the Founders.

Government had to be stable if individual rights were to be respected and guaranteed. While the authors of the Constitution sought to remedy the weaknesses inherent in the loose confederation prescribed in the Articles of Confederation in the years following the Revolution, they worried that centralization of authority would threaten individual rights. Theirs was an

authentic dilemma as they appreciated, perhaps reluctantly, the necessity for centralization of some authority but simultaneously recognized that such concentration carried potential threats to individual liberty. In their concern, they sought to protect the liberty and lives of ordinary citizens. It is unlikely that they would have anticipated the contemporary system where the common criminal invokes constitutional guarantees more frequently than does the ordinary, generally law-abiding citizen.

Contemporary Developments

Throughout most of the nineteenth century and in the first half of the twentieth, there was very little application of the guarantees of fair criminal procedures outlined in the Bill of Rights. One reason for this was that the federal government, which was weaker at that time, did not pass extensive legislation that required criminal penalties against lawbreakers. Most criminal law and other legislation which necessitated criminal penalties came from the state legislatures. Furthermore, as the Bill of Rights stood at that time, the federal government and the federal courts did not have any authority to become involved in reviewing state-level criminal proceedings. Within

Throughout the nineteenth and first half of the twentieth centuries, local patterns of justice developed from the criminal law made by state legislatures.

the states, criminal processes were quite informal compared to today's emphasis on procedural correctness. Justice was swift, trials were short, a larger proportion of cases came to trial than today, and criminal punishment was essentially local, with local sanctions, including execution of extraordinary offenders, as the norm.

Impact of Fourteenth Amendment: Federal Protection in State Cases

It was the Fourteenth Amendment to the Constitution, passed in the wake of the Civil War, that was to bring about a major change in the administration of criminal law. The full impact, however, did not materialize until the second half of the twentieth century. The Fourteenth Amendment stipulated that no state may ". . .deprive any person of life, liberty, or property without due process of law. . . ." For nearly 100 years, this phrase was interpreted by the federal courts to mean that in criminal cases, unless some grossly unfair or arbitrary action had been taken against those accused or convicted of crime, there was no federal remedy for state violations of fair criminal procedures.

The major change in this situation came when the Supreme Court began to declare that various provisions of the Bill of Rights should apply to the states. Court action to apply the Bill of Rights to the states is known as *incorporation;* and it has been done mainly through the Fourteenth Amendment. The federal courts have incorporated most of the Bill of Rights into the Fourteenth Amendment for a variety of reasons. Assuredly, the most important idea is that the Bill of Rights details what "due process of law" consists of. As such, it is a convenient model for interpreting the vague standard found in the Fourteenth Amendment. In other words, incorporation is a way of guaranteeing to citizens that state governments have to give them the same rights in state cases that the federal government under the Bill of Rights must provide in federal cases. In the early parts of the twentieth century, First Amendment rights were gradually incorporated. Starting in the 1960s, the U.S. Supreme Court systematically incorporated most procedural guarantees of the rights of the accused.

Greater Protection for the Accused: The Exclusionary Rule

The famous case of *Mapp v. Ohio* in 1961 was the turning point in developing protections for the accused in state cases. In that case, the facts were trivial. Ms. Mapp's house was searched without a warrant, and some illegal pornographic materials were found in her basement. She was convicted of the crime of possessing these materials, and the case was appealed to the highest federal court. In its decision, the Supreme Court ruled that "due process" requires Fourth Amendment protection against unreasonable searches and seizures and that such protection applies to the states. This means, among other things, that a police officer cannot enter your home

without a search warrant. Furthermore, and more important, the Court also ruled that the federal *exclusionary rule* would apply to the states. The exclusionary rule had been in effect in federal courts since 1914 but had not been required in state courts. Specifically, the rule prohibits the use in court of evidence illegally obtained by searches in violation of Constitutional safeguards.

The Supreme Court decision in *Mapp v. Ohio*, that states must use the exclusionary rule in their courts, has proven to be highly controversial. The problem is that while the intent of the rule is to prevent abuses of power by law enforcement authorities, application of it sometimes means that clear evidence of crime is not admissible in court. Thus, the possibility exists that clearly guilty individuals cannot be convicted. The exclusionary rule has resulted in large numbers of complicated legal rules defining the admissibility of evidence gathered in a variety of search and seizure situations. In the 1968 case of *Terry v. Ohio*, for example, the Court allowed "stop and frisk" searches in suspicious cases, distinguishing them from "search and seizure" cases, in which constitutional requirements for warrants and probable cause hearings would be required.

According to some observers, a "revolution in criminal procedure" took place in...the 1960s.

In the 1960s, the Supreme Court applied other, less controversial, clauses of the Bill of Rights to the states. The right to an attorney, which is guaranteed in the Sixth Amendment, was interpreted in the famous 1963 case, *Gideon v. Wainwright*, to mean that states must provide counsel to poor defendants accused of felonies. Gradually, this right to counsel for indigents was extended to apply to cases on appeal and to misdemeanor cases. States have had to make provision for the attorneys required by these court rulings. In many jurisdictions, public defender offices have been established. In others, judges appoint attorneys from lists of those available to do public defense work.

Other provisions of the Bill of Rights that the Court has applied to the states include the guarantee against being tried more than once for the same crime, the privilege against self-incrimination, the right to trial by jury, the right to be made aware of the evidence available to the state, and the right not to be subjected to cruel or unusual punishment. Indeed, with the exception of the right to have a grand jury determine whether or not enough evidence exists to warrant bringing a person to trial, all the criminal procedure provisions of the Bill of Rights have been incorporated.

Judicial Activism

In some cases, the federal courts have provided extensive interpretations of the constitutional clauses related to accused criminals. These interpretations go beyond earlier conceptions of their meaning. According to some observers, a "revolution in criminal procedure" took place in the decade of the 1960s. Some have praised the Court for this activism and for its efforts to ensure that those accused of crime are not oppressed or treated unfairly by the criminal justice system. Others have condemned the Court for attempting to create a "perfect" justice system. This search for perfection, they say, has led to excessive and time-consuming appeals, undue concern for procedure at the expense of bringing criminals to justice, and a general excess of legalism in the system.

While the Warren Court was responsible for most of the "due process revolution," it should be clarified that the Court was more concerned about fairness than perfection. Time and time again in criminal due process cases, then Chief Justice Warren would ask of the challenged state practice, "But is it fair?" The Court's concern with fairness did not develop out of the proverbial thin air. Rather, the Warren Court built on the decisions of earlier courts (e.g., *Brown v. Mississippi*), where justices recognized standards of fundamental decency and fair play and sought, even without incorporation, to mandate such standards for all courts. Additionally, one must recognize that the Warren Court did limit its concern for fairness to pretrial and trial processes. And, on this issue, it was more conservative than the later Burger Court, which carried some due process guarantees into the post-conviction arena.

Backlash

It is often the case in American constitutional history that strong initiatives by the federal courts in an area of decision making have been followed by a period of backlash. This has been the trend in recent years in the field of criminal procedure. Although the Court under Chief Justice Burger has by no means been unsympathetic to the rights of the accused and has, in fact, handed down some important decisions which expand those rights, there also have been concerted efforts to interpret these rights in a more constricted way than had been the practice in the Warren Court. Perhaps the best example of this is the Burger Court's recognition of the good faith exception in 1984. In *United States v. Leon*, the Court permitted the admission of evidence seized in good faith by police even if the operating warrant later proved defective.

A case can well be made, in fact, that in this area of criminal procedure the Court is once again "following the election returns." At a time when the country was in a fever to extend civil liberties and civil rights,

and there was a general mood of optimism about the possibility for rehabilitation and help for deviants, the Court responded with great concern for those accused and convicted of crime. At a time when the public seems pessimistic about human nature and about the possibilities for change through government intervention, and the public mood can only be said to be punitive toward offenders, the Court has reflected these feelings in its procedural justice decisions.

Whether one supports or rejects the Supreme Court's decisions on constitutional provisions related to criminal procedure, it is important to note that empirical evidence on the actual impact of court decisions in state criminal justice proceedings is mixed. For example, available evidence suggests that the use of the exclusionary rule does not result in the acquittal of many guilty defendants. In a comprehensive assessment of the impact of the exclusionary rule, Bradley Canon, in 1982, reviewed the available evidence and concluded that there are few data to argue that the rule has had a dramatic effect on conviction rates. He points out, however, that the exclusionary rule serves as an important symbol of individual rights. This symbolic benefit, Canon contends, exceeds the substantive benefit of deterrence of either police misconduct or criminal convictions.[10] The same thing, perhaps, can be said of other due process guarantees, although surely there are some exceptions (e.g., right to counsel).

The Right of Accused Persons Not to Have to Testify against Themselves

Roots of the Fifth Amendment

To gain a clearer sense of the way the Constitution influences the treatment of people accused of crimes, let us look at a provision of the Fifth Amendment—the right not to testify against yourself. The origin of the Fifth Amendment privilege against self-incrimination goes back to the earliest days of the adversary system in thirteenth-century England. The claim to the privilege as we know it, however, can be traced to the great religious controversies of the sixteenth century. Called upon to testify under oath regarding religious beliefs, religious minorities were faced with a serious dilemma. Either they denied their religious convictions and lied, or they spoke the truth and suffered persecution. Gradually, religious leaders in the sixteenth and seventeenth centuries began to argue that they could not be compelled to testify under oath against themselves, and they claimed the privilege of silence.

A particularly notorious case centered on one John Lilburne. Lilburne was a Puritan dissenter in seventeenth-century England. He was called to testify before the Star Chamber, a royal court which tried political cases.

Lilburne refused to take the oath demanded of him as part of the proceedings. That oath required the defendant to answer all questions without any knowledge of either the charges against him or the identity of the accuser. In refusing to take the oath, Lilburne emphasized that "... it is absolutely against the law of God; for that law requires no man to accuse himself."[11]

Setting himself against both Charles I and Oliver Cromwell, Lilburne was severely punished. He spent his remaining years in prison, although the privilege he boldly invoked took hold. Gradually, the common-law courts began to accept the right and by the eighteenth century, protection from being forced to testify when one was accused of a crime was an established principle of English law.

Colonial Experience

However clear the privilege was in English common law, it frequently was not honored in the courts of the colonies. During the revolutionary and pre-revolutionary period, the rights of Tory sympathizers were systematically violated in the colonial courts. In 1773, George Rome was arrested and charged by the Rhode Island Assembly with "vile abuse" of the government for writing a private letter that was critical of the Assembly. Rome claimed his rights as an Englishman not to answer the questions which were put to him after he was summoned to appear before the house. According to historian Leonard Levy, "the Assembly, showing no respect whatever for the right against self-incrimination, voted him guilty of contempt and imprisoned him for the remainder of the session."[12] Likewise, in the other colonies the right against self-incrimination was only one of many procedural rights ignored in the cases of those suspected of being friendly to the enemy. Conditions of war and emergency were invoked as a rationale for persecution of Tories and their sympathizers.

Protection for the Accused

After the Revolution, calmer influences prevailed and the English tradition of protection for those accused of crime reasserted itself. The privilege against self-incrimination was included in various forms and with varying degrees of comprehensiveness in most of the early state constitutions. It received expression in the Fifth Amendment to the federal Constitution in the words, "no person shall be compelled in any criminal case to be a witness against himself...." Significantly, the clause was placed among the various clauses of the Fifth Amendment, which sets forth pretrial and other general procedural rights, rather than in the Sixth Amendment, which describes rights at trial. It is evident that the right not to be a witness against oneself was intended to apply not only to actual trials, but also to pretrial procedures, including interrogations, grand jury proceedings, and situations in which

an individual is called to be a witness in someone else's case. Furthermore, the right has been interpreted to include legislative hearings and other quasi-judicial and investigatory proceedings. In effect, the broad, common-law right of silence was codified through court decisions interpreting the Constitution.

The protection against self-incrimination in pretrial situations was particularly important to the Framers of the Constitution because of the long and terrible history of the use of torture as a means of extracting confessions. This history had marred both ecclesiastical and secular judicial proceedings on the Continent and in England as well. Although the right to silence had been established quite early in the common-law courts, which were one branch of the judiciary, some other English courts, including the notorious Royal Star Chamber courts, did not honor this right and routinely obtained confessions from the accused through torture. Leaders in the new nation were particularly eager to guard against the excesses of injustice and cruelty that had been practiced in Europe against political and religious dissenters.

As with other Bill of Rights guarantees, the right not to witness against oneself did not become a controversial constitutional issue until the twentieth century. Even before the Supreme Court decided in 1966 that the right not to incriminate oneself must be honored by the states, torture and other extreme methods used in some state cases to obtain confessions and evidence had been declared unconstitutional under the general right to due process of law.

The Problem of Coerced Confessions

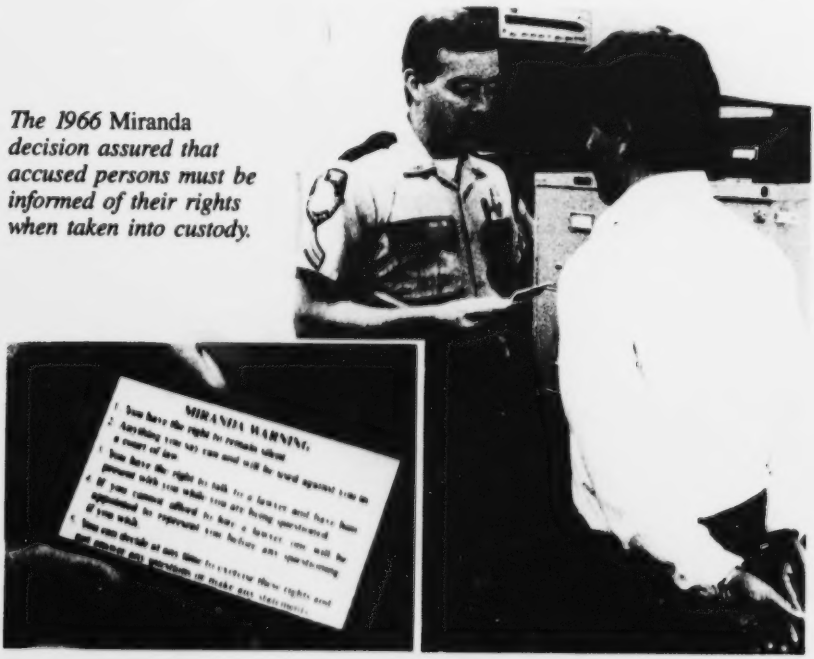
One of the most infamous cases in the first half of the twentieth century was that of *Brown v. Mississippi*, decided in 1936. In that case, four black men suspected of the murder of a white man were brutally beaten and otherwise tortured until they confessed to all details of the crime as outlined by their captors. At the trial, which occurred on April 5, 1934, six days after the murder, no effort was made to deny or hide the circumstances under which the confessions were obtained. Although the case was appealed to the Mississippi Supreme Court, that court also found that the procedures which had been used did not warrant overturning the verdict. The case was appealed to the U.S. Supreme Court, and Chief Justice Hughes denounced the courts of Mississippi in a strong opinion which appealed not only to precedents of the U.S. Supreme Court but also to the long history of the right not to incriminate oneself. "The rack and torture chamber may not be substituted for the witness stand," he said. "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confession of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Quoting from an earlier court decision, Hughes

continued, "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country."

The circumstances of the Brown case were so atrocious that the Court's decision not to allow the confessions in evidence seemed the only one possible. Gradually, however, the Supreme Court outlawed more refined applications of pressure to obtain confessions: lengthy interrogations under adverse circumstances, psychological pressures, and inadvertent confessions when the accused were communicating as private individuals with friends. Finally, the Court decided that the full Fifth Amendment guarantee against self-incrimination, as well as the exclusionary rule which gave teeth to this right, would apply to the states.

Inadmissible Confessions: Miranda

In 1966, shortly after incorporating the right against self-incrimination, the Supreme Court gave an interpretation to this right which proved to be one



The 1966 Miranda *decision assured that accused persons must be informed of their rights when taken into custody.*

of the most controversial decisions the Court ever made. The case itself, *Miranda v. Arizona*, was straightforward and, in the spectrum of cases of venality, violence, and other violations routinely encountered by police, quite ordinary. Miranda, a 23-year-old resident of Phoenix, was accused of rape and picked up by the police. He readily confessed to the crime and was convicted at trial on the basis of his confession. His case was appealed because he did not have an attorney present at his interrogation. The case was heard by the U.S. Supreme Court. In its decision, the Court declared that an individual must have not only the right to silence, but also, upon being taken into custody, must be informed of that right and also of the fact that any statements made by the accused might be used against the accused in a trial. Furthermore, the accused was to be entitled to counsel, to have that right explained before interrogation took place, and to have counsel appointed by the state in case of indigence. These are the famous "Miranda warnings" which have led to debate, study, invective, and further court elaborations. The Miranda case, in tandem with a series of cases dealing with the exclusionary rule in search and seizure incidents, has even been blamed for the dramatic increase in crime which took place during the 1970s. Critics feel that these rules have made it difficult for the police to conduct their business and have made it easy for offenders to get away with crimes by arguing that technical procedural guarantees have been violated in their cases.

Fifth Amendment Protection

What we can see from this short history of the origins and development of the Fifth Amendment is that the old common-law right to silence has developed into a comprehensive right to an attorney for those who are taken into custody in criminal investigations. In an era of complex rules and increasingly efficient law-enforcement processes, where the accused is unlikely to have the background and sophistication to deal with his or her own case, the Constitution, through interpretation, has been modified to protect the potentially innocent citizen. Although the Fifth Amendment right to freedom from self-incrimination originally had been designed to protect dissenters, it has become, in our complex society, a broad form of protection against abuse of government power.

Procedural vs. Substantive Justice

To put criminal procedural issues in more concrete terms, the federal court decision on the appeal of a state criminal conviction in the Alday murders in *Isaacs v. Kemp* (1985) and *Coleman v. Kemp* (1985) is a case in point.[13] On May 14, 1973, three escapees from a Maryland prison—Carl Isaacs, Wayne Coleman and George Dungee—attacked members of the Alday family

in their household in rural Seminole County, Georgia. Six members of the Alday family were brutally murdered and one of the six had been repeatedly raped. The three men were indicted on September 4, 1973, on six counts of murder. In January, 1974, each of the three accused were tried separately and convicted.

Nearly 12 years later, on December 9, 1985, the convictions of the three men were set aside by a federal court, the 11th Circuit of Appeals, on the grounds of excessive pretrial publicity, and a new trial was ordered. The 11th Circuit Court did not question the guilt of the accused men; it even acknowledged "overwhelming evidence of guilt." However, pretrial publicity and a failure by the trial judge to grant a change of venue were considered by the federal appeals court to have made it impossible to have a fair trial.

The Alday case clearly illustrates the continuing tension between the demands of substantive justice and the demands of procedural, or formal, justice in the American system. In the process, it illustrates the lingering controversy emphasized at the start of this paper. Substantive justice demands that the three presumably guilty defendants be punished. Procedural justice demands that they not be punished unless all the rules have been followed. These rules make the criminal justice process an ordered and fair one rather than an arbitrary and hasty one. In the final analysis, the presumption is that the outcome of the process will satisfy the claims of both substantive and procedural justice. However, rules of procedural justice serve as gatekeepers that prohibit access to outcomes of substantive justice until their own demands have been met.

Community outrage at what appears to be the triumph of form over substance, as in the Alday case, is understandable. The criminal process appears to be a game to be played according to certain rules, and it is the rules, rather than the purpose of the game itself, which eventually dominates. The question inevitably arises: Where does the parallel end between game playing and true procedural justice? Should the dozens of petitions filed in some cases be permitted or should there be some way to bring closure to the criminal process? Was the Constitution meant to protect the patently guilty in cases involving crimes against person and property rather than political or religious persecution? These are important questions not easily answered.

Conclusion

From this analysis of criminal justice and the Constitution several conclusions can be offered. First, crime as we know it today was not an issue of consequence for post-revolutionary America. The Founders appeared

to rely on nonlegal social institutions and local courts for the control of deviant behavior that affected or threatened the person or property of citizens. Second, the English common law and experience emphasized procedural regularity and fear of national institutions of government, especially those exercising police power. This emphasis and fear precluded any substantive interest in law and order as we know it today. Third, the Founding Fathers could not have anticipated the contemporary criticism that the Constitution provides a potential shield for criminals. They were particularly concerned with protecting the political rights and liberty of all citizens and ensuring against tyranny; they would doubtless be surprised to see the current situation in which law-breaking and non-law-abiding citizens invoke constitutional protections most frequently.

In terms of both popular opinion and actual exercise today, however, it is fair to say that constitutional provisions related to criminal justice are invoked most often by the criminally culpable to hide from guilt. However, it must be emphasized that the tables can be turned quite quickly. Concern with law and order can move from the punishment of the guilty to the repression of political dissent in short order. A good illustration can be found in the "red scare" and McCarthy hearings of the 1950s, where legitimate sensitivity to both the ideology of communism and the potential power of the Soviet Union quickly evolved into hysteria. In the process, many law-abiding citizens were called upon to testify against themselves and others, and were subject to substantial censure if not imprisonment for their failure to do so. In most instances, their offense consisted of simple membership in unpopular and minority political associations and of criticism of the operation of the U.S. government.

Much of the current controversy surrounding the ordinary innovation of constitutional provisions related to criminal justice appears to be rooted in criticisms of the adversary model. The adversary model is built on the premise that two opposing sides, arguing the truth of their respective positions and challenging the veracity of the arguments of the opposition, provide the basis for a just resolution to the underlying problem or criminal charge. Under such a model, the importance of "playing by the rules" or even of using the rules to win the game is crucial. The alternative model, in which the state has the responsibility to find the truth of a certain criminal situation, and to ensure that substantive justice is done, brings us back to the long history of the development of procedural justice rules in the Anglo-American tradition of law. It brings us also to the fundamental question behind the development of procedural justice and the adversary model: Can we put our faith in princes or must we depend on the technicalities of formal rules to ensure a measure of justice? Put in abstract form, the answer seems clear. The problem, unfortunately, is not an abstract one, and in observing

certain instances, such as the Alday case, we cannot divorce our need to see substantive justice done from our need to see formal justice done as well. Here, we recognize that the criminal justice system must not only *render* justice but *appear* to do so.

In summary, it is necessary to emphasize that the Founding Fathers' inability to anticipate the ways in which constitutional guarantees would be invoked does not render the provisions illegitimate. In any constitutional system, basic principles develop and are refined as we come to understand the dynamics of power and the changing needs of the society itself. However, general or public appreciation of basic constitutional principles is affected by the way constitutional guarantees are interpreted and utilized. Whether one argues that the Constitution should be strictly interpreted and the Founders' intentions rigidly adhered to, or whether one endorses a more flexible system where basic principles are assumed to evolve over time, one has to recognize that the current controversy surrounding crime and the Constitution poses many a thorny question. One also has to recognize that democratic governments face a substantial challenge reconciling the demands of substantive *and* procedural justice.

ENDNOTES

1. Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens: University of Georgia Press, 1983), p. 139.
2. Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1980), p. 24.
3. Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (Chapel Hill: University of North Carolina Press, 1980).
4. Richard Maxwell Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (New York: Oxford University Press, 1975).
5. Walker, *Popular Justice: A History of American Criminal Justice*, p. 46.
6. Kai T. Erickson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York: John Wiley, 1966).
7. Chapin, *Criminal Justice in Colonial America, 1606-1660.*
8. Walker, *Popular Justice: A History of American Criminal Justice.*
9. Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), p. 256.
10. Bradley C. Canon, "Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention," *South Texas Law Journal* 23 (1982): 558.
11. Leonard W. Levy, *The Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: Oxford University Press, 1968), p. 277.
12. Ibid., p. 413.
13. *Isaacs v. Kemp*, 778 F. 2d 1482 (1985); *Coleman v. Kemp*, 778 F. 2d 1487 (1985).

SUMMARIES OF CASES

Barron v. Baltimore, 7 Peters 243 (1833).

The city of Baltimore, in paving its streets, diverted several streams from their natural course, causing deposits of gravel and sand to collect near Barron's wharf, thus rendering the water shallow and preventing the approach of vessels. The wharf was rendered practically useless. Barron alleged that this action on the part of the city was a violation of the Fifth Amendment in that Barron's private property was taken for public use without just compensation. His contention was that this amendment, being a guarantee of individual liberty, ought to restrain the states as it restrained the national government. The Supreme Court ruled that the Fifth Amendment did not restrain the states because the Constitution was established by the people of the United States for their own government and not for the government of the individual states. The Constitution does not pertain to the states unless directly mentioned.

Brown v. Mississippi, 297 U.S. 278 (1936).

Four blacks suspected of murdering a white man were tortured until they confessed to all details of the crime as outlined by their captors. No effort was made to hide the circumstances under which the confessions were made. The Supreme Court of Mississippi upheld the trial court's finding that the methods used to produce the confession were not unwarranted. The Supreme Court of the United States, however, found the confessions inadmissible on the basis of the Fifth Amendment guarantee of the right against self-incrimination.

Gideon v. Wainwright, 372 U.S. 335 (1963).

Clarence E. Gideon was charged in a Florida state court with having broken into and entered a poolroom with intent to commit a misdemeanor. Under Florida law, this is a noncapital felony. Gideon appeared in court without funds and without a lawyer. He asked the court to appoint counsel for him. The court refused because Florida law permitted the appointment of counsel for indigent defendants in capital cases only. Gideon appealed his conviction, claiming violation of the constitutional guarantee of counsel. The Supreme Court ruled that an indigent must be provided counsel in noncapital cases on the basis of the Sixth and Fourteenth Amendments. The Sixth Amendment, said the Court, made the right to counsel essential to a fair trial. By way of the Fourteenth Amendment, then, the Sixth Amendment guarantee to counsel was made applicable to the states.

Mapp v. Ohio, 367 U.S. 643 (1961).

Seeking a fugitive, police searched Ms. Mapp's house without a warrant, and some illegal pornographic materials were found in her basement. She was con-

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Sources: Paul C. Batholomew and Joseph F. Menez, *Summaries of Leading Cases on the Constitution* (Totowa, N.J.: Rowman and Allanheld, 1983), and Jefferson Ingram, *Cases and Materials on Criminal Procedure* (Cincinnati, Ohio: Anderson Publishing Co., 1986).

victed of the crime of possessing these materials, and the case was appealed to the Supreme Court. In its decision, the court ruled that "due process" required that the Fourth Amendment protection against unreasonable searches and seizures applies to the states. This means, among other things, that a police officer cannot enter one's home without a search warrant. Furthermore, the Court also ruled that the federal exclusionary rule would apply to the states, thus prohibiting the use of illegally obtained evidence in any court.

Miranda v. Arizona, 384 U.S. 436 (1966).

Mr. Miranda was accused of rape and was arrested by the police. He readily confessed to the charges against him and was convicted on the basis of his confession. His case was appealed because he did not have an attorney present at his interrogation. The case was heard by the U.S. Supreme Court and, in its decision, the Court declared that an individual must have not only the right to silence, but also, upon being taken into custody, must be informed of that right and also of the fact that any information offered by the accused might be used against him or her in a trial. Furthermore, the accused was to be entitled to counsel, was to have that right explained before the interrogation took place, and was to have counsel appointed by the state in case of indigence. The Court reached this decision by way of the Fifth Amendment's right to counsel and protection from self-incrimination as well as the Sixth Amendment's right to counsel.

Terry v. Ohio, 392 U.S. 1 (1967).

Mr. Terry was "stopped and frisked" by a police officer made suspicious by Terry's actions. The frisk revealed a handgun. Terry was arrested and charged with possession of a concealed weapon. Claiming protection under the Fourth Amendment, Terry argued that he had been subjected to an "unreasonable search and seizure." The Supreme Court, however, concluded that the weapon was properly admitted in evidence because, where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot and that the person with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for himself and the protection of others to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is reasonable under the Fourth Amendment, and any weapons seized may be properly introduced in evidence against the person from whom they were taken.

United States v. Leon, 104 S. Ct. 3415 (1984).

A secret informant with no established reliability shared information with two police officers in Burbank, California, about drug dealers. On this information, the police initiated surveillance of the suspects' homes and also observed

persons with whom they were acquainted. Over a month, police collected information that they eventually used to obtain a search warrant for three homes and two cars. The suspects were later arrested for the possession of large quantities of illegal drugs. Prior to trial, suspects filed motions to suppress the evidence seized and alleged that probable cause had not been established to justify the warrants. After lower federal court decisions, the Supreme Court granted certiorari to decide if the exclusionary rule could be modified to include evidence obtained in good-faith use of a search warrant that was subsequently found to be defective. The U.S. Supreme Court answered in the affirmative.

QUESTIONS FOR DISCUSSION

1. In colonial America, what were the pervasive public concerns regarding crime and justice? What were the origins of these issues?
2. What attitudes and concerns of the Founders regarding crime and justice and law and order helped to shape the Constitution and the first 10 amendments?
3. How has "incorporation" of the Bill of Rights through the Fourteenth Amendment expanded procedural protections of the accused?
4. What is the *exclusionary rule*, and how was the case of *Mapp v. Ohio* pivotal in the expansion of procedural protections of the Fourth Amendment?
5. Trace the roots and development of the Fifth Amendment. How did decisions in *Brown v. Mississippi* and *Miranda v. Arizona* strengthen its protections of the accused?
6. Given the apparent contradictions between substantive and procedural justice, do you think the Bill of Rights would be ratified if it were submitted to the American public today?

ESSAY SIX

Voting Rights and Change in the South

By Tony Freyer

Introduction

The struggle for voting rights is as old as the nation. In 1789, when the Constitution was ratified, most people could not vote. The Framers could not agree upon the requirements for suffrage and left the power to establish voter qualifications to the states. The states were usually guided by self-interest, not by concern for fundamental American rights. Extending the franchise to all adults has meant wresting control from the states by gradually eliminating requirements of property ownership, race, and sex.

In a popular government, where the people are the avowed source of government power, a person who cannot vote has less power to effect change or voice approval than does a person who can vote. When many are denied the right to vote, when large numbers of people have no voice in their government, democracy is threatened.

Probably no group of Americans has wrestled with the issue of voting rights more than southerners. Economic institutions, political power, individual gain, and community welfare have all come into play in the conflict over the franchise in the South. During the 1950s and 1960s, a constitutional revolution occurred in which federal protection was extended, thus diminishing the states' control over voting rights. Many fair-minded people both inside and outside the South found their faith in the American ideals of equality and justice sorely tested as resistance ensued. The heritage of the South, rooted in slavery, secession, equivocal failure of Reconstruction, and the nation's acceptance of the disfranchisement of black voters, made the battle for civil rights a painful experience. Coming, finally, when not only blacks but many whites who cherished freedom would stand no more, federal intervention was reluctant. But, with the force of public concern and the U.S. government behind it, the civil rights movement was an apparent triumph for liberty and justice. Nevertheless, today as we review

Martin Luther King was among those who led the march in Washington, D.C., in August 1963, calling for civil rights legislation.

these developments, voting rights must be considered as fragile as all democratic freedoms, and we must question whether the gains of the civil rights era will endure.

State Control of Voting

Like the Declaration of Independence, the Constitution derived its legitimacy from the people. In the eighteenth-century world dominated by monarchical and aristocratic systems, a government founded on popular consent was exceptional. Yet, in early America "the people" meant primarily white, male, property owners over the age of 21. Excluded were ethnic, religious, and racial minorities and women. Because property distribution was fairly broad, the opportunity to participate in the electoral process was widespread. Nevertheless, the Framers gave the states the authority to determine voter eligibility, by requiring each state to permit those qualified to vote for the "most numerous branch" of the state legislature also to vote for members

of the U.S. House of Representatives. Indirectly, that gave constitutional approval to the principle of restriction. As a result, prior to the Civil War, efforts to extend the franchise had to be concentrated on the states.

During the nation's early years in both northern and southern states, local political considerations influenced efforts to extend voting rights. Politics was organized around individuals or groups held together by shared bonds and interests, and the political environment in which such factions flourished changed markedly during and after the Revolution. There was a tremendous increase in the number of state and local elected offices; in many states the number of legislative representatives rose threefold from 1776-1800. The men seeking these offices often resorted to new voter-mobilization techniques: printed broadsides, ballot samples, newspaper articles attacking the opposition and other forms of propaganda, ethnically balanced tickets, demagogic appeals to class or ethnic tensions, and appeals to rich patrons who paid election expenses. Would-be representatives used these devices to build county machines through which they sought assembly seats and appointments to county offices for themselves, or to control county patronage on behalf of their supporters. Related to these changes were geographic divisions within states, particularly between the seaboard and upcountry, which heightened a sense of local autonomy and rivalry.

Extending Voting Rights

The interplay between constitutionally sanctioned state control and locally oriented politics generated pressures for a broadened franchise. Those opposing change stood by the constitutional provisions imposing racial, ethnic, religious, and property restrictions. Two features of American society, however, benefited the cause of reform. The first involved the opportunism associated with the intensity of local political rivalries. Many candidates perceived that their chances to be elected would be increased if they won the support of disfranchised groups, so these politicians pushed for reform. The second feature according to Alexis de Tocqueville, was that virtually all Americans professed faith in republican liberty. This belief defined liberty in terms of individual rights and the citizen's direct participation in the commonwealth.

Advocates of extended voting rights were able to appeal to these long-professed values as they fought for reforms, which, of course, also served their own individual interests. By the 1820s, reformers increasingly succeeded in winning state constitutional revisions which abolished restrictions upon adult, white male suffrage. These victories ushered in the era of Jacksonian democracy.

Jacksonians used the constitutional reforms to build a new political party system. Federalists and Jeffersonian Republicans had brought party discipline

to innumerable local factions throughout the states, but Jacksonian reform was imposed from the top down. Following the Jeffersonian triumph in 1800, party control had weakened and factional politics had become dominant. The Jacksonians in the 1820s not only revitalized the party structure, but transformed it by establishing vigorous local organizations. The ability of the Democrats to mobilize voter support for national policies depended on this local control. The decentralized party system encouraged appeals to people with diverse interests who viewed national measures largely in terms of local impact. In state elections, the strictly local considerations became even more pronounced. The Jacksonians' success prompted the opposition to adopt the same organizational structure, and it has shaped the nation's electoral process ever since.

Although voting reform eventually triumphed in both the North and the South, the sections diverged somewhat on the rights of free blacks. By the 1840s, several New England states permitted free blacks to vote, whereas

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. . .the South feared that if free blacks could lawfully vote anywhere, the right might spread and ultimately imperil slavery.

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the rest of the nation including the South, denied their participation in the electoral process. In New York, which had allowed black property holders to vote prior to the era of constitutional reform, Democrats *withdrew* the right in 1846 because blacks had favored the Whigs. But New England's exceptionalism was significant primarily because the South feared that if free blacks could lawfully vote anywhere, the right might spread and ultimately imperil slavery. The Liberty and Free Soil parties unsuccessfully supported freedman suffrage in Ohio and Wisconsin, foreshadowing the Republicans' eventual espousal of the same cause in 1865. Thus, even though Chief Justice Roger B. Taney had stated in his famous *Dred Scott* opinion of 1857 that blacks had no rights (including suffrage) that a "white man" was "bound to respect," southerners felt threatened.

The Dorr Rebellion

The suffrage struggle of blacks in Rhode Island during the Dorr Rebellion increased the anxiety of southerners. Until the 1840s, an old colonial charter was the constitutional basis of government in Rhode Island. Thomas Wilson Dorr, a Democratic party leader, led the campaign for state constitutional reform which eventually climaxed in the establishment of two opposing governments, each claiming to be legitimate. Blacks, who had initially sup-

ported Dorr, were disappointed when the new constitution his party drafted denied them the right to vote. To divide Dorr's supporters, the opposition made a new constitution which among other reforms extended suffrage to blacks. Eventually, a majority of the state's voters repudiated Dorr and his government, but the final stage of the confrontation occurred in 1849 when the Supreme Court, in *Luther v. Borden* (1849), declined to review the question of which government was legitimate. In its decision, the Court declared that the issue was a "political question" beyond the jurisdiction of the judiciary. However, the Court in effect repudiated the Dorrites when, on the basis of the U.S. Constitution's guarantee of a republican form of government to every state (Article IV), it approved the seating of the congressional delegation Rhode Island had sent to Washington in 1842. This delegation was elected by the same majority that had rejected Dorr.

Dorr's Rebellion troubled southerners for several reasons. In the context of rising abolitionist and antislavery feeling during the 1840s, the apparent success of blacks in gaining the vote in Rhode Island was ominous. Moreover, the Court's *Luther v. Borden* decision affirmed the constitutional principle that, as a "political question," the right to vote was entirely under the control of the states. This meant that through local participation blacks could gain support for their freedom in national political parties and in the U.S. government, thereby threatening the power of the slave-holding states. Since the overwhelming majority of northern states denied voting rights to blacks, southerners' fears seemed unfounded. But in the 1850s, as concern grew about the extension of slavery into the territories, the status of sojourner slaves, and the constitutionality of the northern liberty laws, it was not surprising that the voting rights issue gave cause for anxiety in the South. By 1860, the interplay of party politics, sectional antagonism, and the uncertain constitutional status of slavery and free blacks generated irreconcilable differences, resulting in the nation's greatest tragedy, the Civil War.

National Control of Voting: Reconstruction

Black suffrage did not become a major issue until 1864, when the problem of Reconstruction divided Congress and the president. During 1864 and 1865, Congress enacted legislation setting out the conditions governing the status of the southern states within the Union, including the disfranchisement of Confederate civil and military leaders. At the same time, congressional Radicals wanted to extend voting rights to blacks serving in the Union military. But, following Lincoln's veto of the congressional measures regarding the southern states, the modest attempt at black enfranchisement failed. The incident was important because it revealed how difficult it was to overcome the constitutional principle that left control of voting require-

ments to the states. To Lincoln, who had required of Confederate leaders only an oath of loyalty to the Union, disfranchisement was too extreme. Although the congressional majority was more aggressive than Lincoln concerning the suffrage of southern whites, it declined to support even a limited black franchise.

Southern resistance after Appomattox, however, compelled Congress to take stronger action. By 1866, southern legislatures had enacted harsh Black Codes resembling slave laws whose apparent purpose was to make the freedmen a captive labor force possessing few if any rights. Even though the Thirteenth Amendment had made slavery unconstitutional and the South had been defeated on the battlefield, the freedmen remained in bondage. Congress responded by enacting legislation which placed the civil rights of blacks in the former Confederate states under temporary federal military protection. President Andrew Johnson met this effort with repeated vetoes, but large congressional majorities overrode his opposition.

Meanwhile, Congress asserted primary control over Reconstruction, including the terms defining the seceded states' constitutional standing within the nation. In effect, Congress made the readmission of each southern state conditional upon ratification of the Fourteenth Amendment. The amendment guaranteed citizenship as a national right, forbade states from abridging a citizen's privileges and immunities, and declared that no state could "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." The amendment did not categorically confer suffrage upon the freedman; it did, however, reduce the representation of states which denied blacks that right. Further, it barred from state or federal office those who had held office under the Confederacy.

The central principle of Radical Reconstruction was black suffrage.

Every former Confederate state except Tennessee rejected the Fourteenth Amendment. Republican moderates had guided the initial attempt at reconstruction in 1866. Faced with continuing southern resistance and opposition from President Johnson, however, congressional Radicals took over in 1867. The central principle of Radical Reconstruction was black suffrage. Enfranchised freedmen could assert and defend their civil rights, thus removing the need for continuing federal intervention in local gover-

nance. They would also provide the votes necessary for the adoption of the Fourteenth Amendment and the states' readmittance to the Union. To bring about black enfranchisement, Congress placed the South under strengthened military rule. A series of laws authorized the use of military tribunals to protect the rights of all citizens. Any attempt of the state to interfere with lawful military conduct was declared unlawful. All 10 existing southern state governments were placed under the paramount authority of Congress, and were required to write constitutions which guaranteed black suffrage and ratified the Fourteenth Amendment.

Although these measures were extreme, they did not accomplish all that the Radicals wanted. The Radicals were unable to gain majority approval for land distribution, property confiscation, and the abolition of the governments that had enacted the Black Codes. But perhaps the most significant weakness of Radical Reconstruction was that it left to the states the process of drafting new constitutions. Thus, despite congressional supervision and military protection, ultimate acceptance of the new constitutions was left to local voters. To be sure, the proportion of eligible voters included many blacks, but they were in the majority in only five states. Moreover, contrary to legend, the white majority in the five remaining states and the region as a whole was composed primarily of indigenous southerners, not Yankee carpetbaggers. In addition, although many former Confederate officials were excluded from voting, the actual number was not as great as the Radicals had hoped for. Generally, then, the new constitutions neither purged the old ruling class nor overturned the established governmental order.

Between 1868 and 1870, the 10 southern states ratified new constitutions recognizing black suffrage and civil rights and ratified the Fourteenth Amendment, whereupon Congress voted to readmit them to the Union. But southern resistance also intensified. Since the old political power structure remained intact, there was little to prevent its leaders from regaining control and repealing the state constitutional provisions which guaranteed the black franchise. As Johnson's impeachment trial proceeded during 1868, southerners resorted to private intimidation of both whites and blacks supporting the Reconstruction constitutions. Terrorist groups like the Ku Klux Klan formed to keep voters from the polls. The central goal of the terrorist campaign was the establishment of white, ex-Confederate control of the Reconstruction governments through the abolition of black voting rights and the defeat of southern Republicans. By 1870, the traditional southern leadership had regained power in four states and threatened Republican rule elsewhere.

The Republicans responded with the Fifteenth Amendment and a series of enforcement measures. Ratified early in 1870, the Fifteenth Amendment authorized limited federal regulation of voting but did not significantly restrict

state control of the electoral process. The amendment stated that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." It also conferred upon Congress the power to enact enforcement legislation. The Fifteenth Amendment's language emerged from compromises between Radicals who urged the guarantee of universal male suffrage and moderates who sought to preserve state control of the franchise. Hence, it *did not confer the right to vote*, it merely *prohibited racial discrimination in voting*. Furthermore, the moderates blocked Radical efforts to protect blacks from state-imposed literacy and property tests and against laws excluding them from office. Congress also passed a series of enforcement acts designed to overcome terrorist tactics and to defend blacks at the polls.

Failure of Reconstruction

By 1877, Radical Reconstruction had collapsed. Briefly, during 1870-71, President Ulysses S. Grant enforced the anti-terrorist laws vigorously enough that the Ku Klux Klan and similar groups were forced to disband. The success was temporary, however, for once the ex-Confederate leaders regained control, they used more sophisticated forms of lawful or extralegal coercion to disfranchise blacks. Moreover, once the terrorist groups were no longer useful, the old southern leadership withdrew its support of them anyway.

At the same time, political expediency undercut Republican support for Reconstruction. In the presidential campaign of 1872, a coalition of Liberal Republicans and Democrats set forth a platform calling for an end to federal intervention in the South. The mainstream Republican party easily won the election, but to maintain unity they called for, and Congress passed, a general amnesty restoring the office-holding privilege to nearly all former Confederates. Meanwhile, the cost of civil rights enforcement was high, raising the always unpopular specter of increased taxation. Relentless southern white hostility and unsympathetic southern federal district judges also limited effective prosecution of the enforcement laws.

In addition, Republicans wanted to secure their principal base of support outside Dixie; thus most of the money appropriated for federal election supervision went to urban centers in northern and border states. Finally, after the disputed presidential election of 1876, Republican and Democratic leaders agreed upon a compromise which resulted in a Republican, Rutherford Hayes, becoming president and the southern Democrats winning the end of Reconstruction.

Small Gains for Blacks

Although Reconstruction failed, the experiment in national protection of voting rights was not a total loss. Despite its moderate language, the Fifteenth

Amendment encouraged at least a modest defense of black suffrage outside the South. Whereas blacks held the right to vote in only a few New England states before 1861, after 1870 their exercise of the right increased slightly nationwide, particularly in several major northern cities. Congress had already enfranchised blacks in Washington, D.C., in 1867. Yet, it would be decades before northern blacks had any significant political influence, although they did have some impact on the urban machines that dominated several northern municipal governments during the early twentieth century. Black participation in the political process, on even this limited scale, established a precedent which W.E.B. Dubois and others fought to extend with the creation of the National Association for the Advancement of Colored People in 1910.

Even in the South, federal protection temporarily sustained black voting after Reconstruction ended. Until 1885, Republican administrations provided modest federal supervision of national elections, and the U.S. Supreme Court generally upheld this action. The Court narrowly construed the Fifteenth Amendment in the leading voting rights case, *U.S. v. Reese* (1876). Under a federal statute, federal authorities indicted a Kentucky election official for rejecting a black man's vote. The Court threw out the indictment on the grounds that the federal law upon which it was based was not specifically restricted to racially discriminatory offenses. The majority correctly pointed out that the Fifteenth Amendment did not confer the franchise to anyone, it merely prohibited *interference* with the voting right for reasons of race, color, or previous condition of servitude. The statute, therefore, was found unconstitutional. But in cases where the conduct of state officials clearly violated specific constitutional provisions, the Court held it to be unlawful. Thus, in several cases the Court upheld the government's conviction of state officers for fraudulent interference in federal elections. The Court also decided in *Ex parte Yarbrough* (1884), that in national elections federal authorities had the power to protect voting rights against both racially and nonracially motivated private discrimination.

The Effects of Populism

Throughout the South, federal protection had made a difference. As late as 1901, there were 147,000 eligible black voters in Virginia. In Texas during the 1890s, the rise of Populism divided the white vote so that in some areas a black minority could determine the outcome of local elections. But the Populist movement was the turning point for the black franchise in the South. Populists appealed to workers on the basis of economic interests, often ignoring racial distinctions. The dominant Democratic leadership feared that such a coalition would eventually defeat them; as a result, they carried out a full-scale disfranchisement campaign.

Court Responses to Southern Legislation

By the turn of the century, nearly every southern state had enacted legislation that virtually eliminated black voting in statewide elections. The laws instituted literacy requirements that were selectively enforced by local officials and the poll tax. Probably the most important device was the white primary, which excluded blacks from voting in the Democratic primary election. The primary in itself wasn't considered a violation of the Fourteenth Amendment because it was not a "state" election, but a "private" party election. Since the Republican party was insignificant in most southern states, the primary determined the actual election. Because of such measures, the number of eligible black voters in Virginia dropped to 21,000 in 1905, and most of these were ineligible because they had not paid the poll tax. The results were similar everywhere. As Sheldon Hackney, noted southern historian, said of Alabama, white Democratic leaders ended the threat of Negro votes "by eliminating Negro voting."

Southern legislatures carefully tailored the new disfranchisement legislation to constitutional limitations established by the Supreme Court. In decisions from *Reese* to *Yarbrough*, the Court had upheld federal authority to protect voting rights in state and federal elections against racially motivated interference by state officials or private individuals. Yet, the Court had narrowly interpreted what was an unconstitutional denial, and lawmakers skillfully exploited this construction as the case of *Williams v. Mississippi* (1898) showed. The question was whether a Mississippi law authorizing literacy tests violated the equal protection clause of the Fourteenth Amendment. Although the Court admitted that the law might effectively exclude blacks from elections, it found no evidence of discriminatory intent and therefore upheld the constitutionality of the provision.

At the same time, the Court sanctioned the poll tax. The Court's reasoning was consistent with reality in at least one respect: the measures not only denied blacks the franchise but permitted the exclusion of many poor whites from the polls as well. Hence, the law on its face was not racially discriminatory even though in its actual operation it was clearly so.

Basis of Southern Opposition

Several factors help explain the southern campaign against black voting rights. The most obvious was the traditional leadership's determination to retain political power, which first Reconstruction and then Populism had jeopardized. The drive for power was entwined with the effort to control and maintain a cheap labor force. During Reconstruction and the Populist crusade, blacks had voted for improved educational and economic services. These measures, however, required increased taxation that would have fallen primarily upon the same propertied interests that dominated the political

and economic order. Since the vote was the basis of black educational opportunity and economic liberty, it was not surprising that southern white leaders attacked it. To a considerable degree, then, the ties between freedom and power that had made slavery such a disruptive issue also motivated the movement for black disfranchisement.

The faith in white supremacy was a vital, though ambiguous, factor. Throughout the South, there were areas where blacks voted in local elections despite the disfranchisement laws—primarily in western Tennessee,

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. . .in some cases economic and political considerations could override racial antagonism to permit black voting.

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western North Carolina, and Arkansas. Generally, white leaders in these areas ensured their repeated election by providing services, jobs, or credit in return for local black votes. The most famous example of this practice was the E. H. Crump machine in Memphis, which functioned much like boss-run municipal governments in the North. In the planter-dominated eastern delta of Arkansas, the franchise was used similarly. Blacks in Little Rock, however, constituted an independent group, who, if whites were divided, could determine the outcome of an election. These instances indicated that in some cases economic and political considerations could override racial antagonism to permit black voting.

It was in locations where blacks were a disproportionate majority, particularly in the "black belt" of the Deep South, that racial appeals were pervasive. During Reconstruction and the Populist era, these places had experienced most directly the pressures for real power sharing based on free suffrage. As a result, it was here that southern leaders routinely relied upon racial demagoguery to defend disfranchisement.

South Not Alone

The attack upon voting rights was not unique to the South. During the early twentieth century, Progressives instituted franchise restrictions that undercut the influence of the political machines controlling many northern cities. Despite corruption, this system fostered widespread citizen participation in the democratic process which in turn generated high voter turnouts especially among ethnic minorities. In the name of non-partisanship, however, Progressives enacted electoral provisions weakening the party organizations to which these groups were loyal. The boss system persisted in many northern urban centers preserving on a limited scale ethnic as well as black

voter participation, but the actions of the Progressives revealed that they, like the southerners, would resort to disfranchisement as a means to power.

From Reconstruction on, southern blacks struggled to participate in the democratic process. Despite determined opposition from ex-Confederate leaders, federal protection facilitated this effort until the mid-1880s, establishing the basis for involvement in the Populist campaign. Throughout this period, blacks, like other Americans, perceived the vote as a means to improve their material well-being. But it was precisely this link between civil and economic liberty that jeopardized the established political and economic order.

The new disfranchisement laws, like those the Progressives enacted in the North, affected poor whites as well as blacks. Yet, especially in the Deep South where blacks often outnumbered whites, the emotional appeal of white supremacy produced an even more extensive suffrage restriction. Throughout both the North and the South, there were areas where blacks continued to vote, although in most localities, it was the influence of local party machines that sustained that right. Limited though this experience was, along with a revitalized federal protective role and a broader constitutional interpretation by the courts, it would bring about change.

Emergence of Federal Protection

Working through the Courts

Disfranchisement dominated the South until the 1950s and 1960s. During the first half of the twentieth century, the NAACP worked through the courts to alter the system. Gradually, the Supreme Court broadened its construction of constitutional provisions, transforming voting rights inside and outside Dixie. For Martin Luther King and other black leaders, winning suffrage was a central goal of the civil rights movement. The white southern leadership mobilized massive popular resistance to the civil rights campaign and the Court's decisions. This resistance was not overcome until Congress established effective federal protection of voting rights.

The NAACP's judicial strategy had uneven success prior to World War II. An initial victory was *Guinn v. U.S.* (1915), in which the Court overturned "grandfather" clauses in state law. The Court held that constitutional and legislative provisions extending the franchise only to persons whose ancestors could vote in 1866 violated the Fifteenth Amendment. In addition, the decision struck down literacy tests if they were entwined with the enforcement of the grandfather provisions. However, since there was no corresponding establishment of federal supervision, *Guinn*'s primary significance was that it encouraged further litigation by the NAACP.

A black voter is being shown how to vote at a polling place in Maryland in this 1942 photo.

A series of important cases focused on the white primary in Texas. The Fourteenth Amendment prohibited formal discrimination by the state; the Court's narrow interpretation of state action, however, permitted the exclusion of blacks in primaries because a party theoretically acted as a private association. The issue in Texas was whether the exclusion of blacks from the Democratic primary by party rule constituted state action. In a few areas, including El Paso, local party leaders ignored the rule and blacks were allowed to vote as late as the 1920s. To prevent this practice, the legislature passed legislation in 1923 that excluded blacks from the primary. An El Paso resident, Dr. L. A. Nixon, challenged the law and his case reached the U.S. Supreme Court in *Nixon v. Herndon* (1927). The Court found the law to be an unconstitutional violation of the equal-protection clause of the Fourteenth Amendment, whereupon lawmakers rewrote the provision to return the determination again to the party. Nixon went to court a second time, and again the Court decided in his favor. Finally, the legislature empowered the state convention of the party to set the rules governing primaries, leaving the matter to the statewide Democratic bosses who had supported the original exclusionary standards. When these rules again

reached the Court in *Grovey v. Townsend* (1935), the majority decided that since the state party committee was acting on behalf of the Democratic party as a private organization, no "state action" was present. Hence, there was no violation of either the Fourteenth or Fifteenth amendments.

The Court's vacillation concerning the white primary came to an end in 1944. During the late 1930s and early 1940s, President Franklin D. Roosevelt's appointments to the Court generally favored judicial activism on behalf of voting rights. By 1941, in *U.S. v. Classic* the majority held that the federal government could lawfully regulate a state primary in which candidates were being chosen for federal elections. The case arose from ballot tampering in New Orleans, but because Louisiana law regulated the local election, the Court's decision sanctioning federal supervision had significant implications for the status of the state-action principle. Three years later, in *Smith v. Allwright* (1944), the Court expressly reversed its decision in *Grovey v. Townsend*. Again at issue were the Texas white primary rules. This time, however, the Court held that the state's delegation of rule-making responsibility to the Democratic party convention was "state action" within the meaning of the Fifteenth Amendment. Since the convention had excluded blacks from primary elections, its rules were unconstitutional.

After *Allwright*, the Court consistently struck down official interference with voting rights. Following a broad construction of state action, the Court struck down, as a violation of the Fifteenth Amendment, Alabama registration provisions that made voter eligibility dependent upon an individual's ability to understand state constitutional articles. The justices found that local registrars enforced the measures on a discriminatory basis, expressly to exclude blacks from the polls. Another leading decision was *Gomillion v. Lightfoot* (1960). Alabama law permitted the drawing of district borders in the city of Tuskegee, which excluded all but a small minority of blacks from municipal elections even though black residents constituted a large majority living within the city limits. The Court struck down the state-sanctioned electoral boundaries as a violation of the Fifteenth Amendment.

Public Support for Protection

National political developments reinforced the NAACP's success in court. During the 1930s, Roosevelt's New Deal coalition included blacks, especially those living in northern metropolitan areas. In addition, employment opportunities during World War II attracted increasing numbers of southern blacks to northern cities. These changes helped to diminish the influence of the disfranchisement devices established during the Progressive Era. By the late forties and fifties, in order to gain this group's support, Republicans and northern Democrats advocated moderate civil rights measures. These considerations, along with the Supreme Court's increased activism in such

cases as *Brown v. Board of Education* (1954), resulted in passage of civil rights legislation in 1957 and 1960. Both acts included provisions designed to strengthen federal prosecution for interference with voting in southern federal elections. Weak enforcement by the federal government and the narrow scope of federal authority, however, significantly reduced the effectiveness of these laws. It was the South's campaign of massive resistance and the civil rights movement's nonviolent response to it, from Little Rock in 1957 to Selma in 1965, that most directly shaped the struggle for black suffrage. Little progress was made until the 1960s.

Since the nation's beginning, southern leadership restricted political freedom in order to preserve a captive labor force. The South's business establishment supported these efforts until the 1960s. Although state law mandated segregation in public accommodations, transportation, social relations, and education, it did not require segregation in the work place. Yet throughout industry, southern businessmen enforced segregation on their own authority.

By the mid-1960s, however, massive resistance was causing such turmoil that southern urban business leaders gradually began to support modest desegregation in order to improve the economic environment. In and of itself, this shift was not enough to overcome the racial antagonism that political leaders appealed to as the basis of resistance. Combined with other factors, however, it was not insignificant.

With skill and courage, Martin Luther King aroused northern moral sensibilities in opposition to the tragic results of southern massive resistance. As King carried on his nonviolent campaign during the early sixties, the Supreme Court further revolutionized voting rights in its apportionment decisions. The Court broke new ground with several opinions that overturned the political-question doctrine established in *Luther v. Borden*, which had withdrawn the judiciary from involvement in non-race-related apportionment cases. By 1964, the Court established the principle that political representation in electoral districts was to be based upon "one man, one vote." This gave traditionally underrepresented urban areas increased clout in state and national elections throughout the nation. In the South, the apportionment revolution eventually heightened the influence of urban businessmen, whereas in the North it aided blacks.

Civil Rights Act of 1964

These pressures compelled Congress to establish comprehensive federal voter protection in the South. Article I of the Civil Rights Act of 1964 was intended to establish effective federal enforcement of voting rights in southern federal elections. The law imposed significant restrictions upon the use of literacy tests and prohibited discrimination in the regulations controlling

citizens' eligibility, registration, and voting. Liberals wanted the law to include the entire nation, but in order to obtain broad bipartisan support among northern congressmen and senators it was compromised to apply only to the South. In 1964, the states also ratified the Twenty-Fourth Amendment outlawing the poll tax.

The Voting Rights Act of 1965

The Voting Rights Act established stronger federal enforcement authority in both state and federal elections. Previous legislation did not provide for ongoing federal supervision of local registrars, but the 1965 law remedied this defect. It gave the federal government the power to automatically suspend disfranchisement devices like literacy qualifications in areas where the census showed that less than half of the eligible voters were registered or had voted in the election of 1964. Where the action of states was determined to be in violation of the Fifteenth Amendment, the federal government was empowered to appoint federal "examiners" to supervise elections and to protect the exercise of voting rights. The law also required federal approval of voting regulations in all localities where it applied. Finally, the Justice Department was directed to begin judicial proceedings testing the constitutionality of the poll tax.

The 1965 law applied primarily, but not exclusively, to the South. Immediately following enactment, the U.S. Attorney General extended application of the law to localities in Arizona and Alaska, but its principal focus was five southern states. In *South Carolina v. Katzenbach* (1966), South Carolina challenged the provisions of the Voting Rights Act involving literacy devices and the authority of federal examiners. The claim was that the Fifteenth Amendment did not empower Congress to establish such comprehensive federal supervision of voting rights, a subject the Constitution left to state control. The Supreme Court rejected this contention, upholding broad congressional power to pass legislation enforcing and prohibiting discrimination in the exercise of the right to vote. In this and other cases, then, the judicial activism that had strengthened voter rights since World War II apparently had triumphed.

Conclusion

By the early 1980s, the status of black voting rights was somewhat ambiguous. To be sure, federal protection made it possible for blacks to become a real political force throughout the southern states. It was unclear, however, whether that power was secure enough to survive the withdrawal of federal support. There were repeated efforts to preserve predominantly white voting districts in areas where blacks constituted a large minority or a

majority. Generally bipartisan coalitions in Congress resisted, and the courts overturned these efforts. Nevertheless, within and outside the South there was enough popular opposition to minority suffrage gains that the Justice Department initiated litigation arguing in favor of maintaining districts that diluted black voting strength. This was part of a general attempt to reduce federal responsibility for the protection of voting rights.

In summary, then, the complex interplay of sectional political tensions, racial antagonism, white social and political dominance, and the acquiescence of the federal government and the Supreme Court maintained state disfranchisement of southern blacks for most of our history. Not until the NAACP and the civil rights movement compelled federal authorities to establish a policy of protective activism did change come. Although many southern white businessmen eventually gave moderate support to civil rights, they did so only after the federal government adopted its protective policy. The demise of federal protection following Reconstruction suggested how vulnerable voting rights were to pressures of political expediency. Whether history will repeat itself is a compelling question as the twentieth century draws to a close.

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SUMMARIES OF CASES

Luther v. Borden, 7 Howard 1 (1849).

A struggle over the legitimacy of a Rhode Island state government established as the result of the Dorrite Rebellion during the early 1840s gave rise to this case. The Supreme Court held that the issue was a "political question" out-

side the jurisdiction of the judiciary. The immediate impact of the decision was that it confirmed state control of voting rights which concerned southerners because one result of the Rhode Island confrontation was that blacks eventually gained the right to vote. Even though all but a few northern states excluded blacks from the polls, southerners nevertheless feared that the Rhode Island conflict was a harbinger of the future. The long-term result was that courts generally declined to become involved in voting rights cases as a "political question." Not until the early 1960s, when the Court established the "one man, one vote" principle, did judicial activism overcome this policy of judicial self-restraint. This, in turn, was a factor influencing the establishment of federal protection of voting rights in the civil rights legislation of the mid-1960s.

U.S. v. Reese, 92 U.S. 214 (1876).

Under a federal statute, federal authorities indicted a Kentucky election official for rejecting a black man's vote. The Court threw out the indictment on the grounds that the federal law upon which it was based was not specifically restricted to racially discriminatory offenses. The majority correctly pointed out that the Fifteenth Amendment did not confer the franchise on anyone, it merely prohibited interference with the right for reasons of race, color, or previous condition of servitude. The statute was, therefore, unconstitutional. This decision significantly restricted the authority of the federal judiciary in voting rights cases, and encouraged the eventual triumph of Jim Crow laws.

Ex parte Yarbrough, 110 U.S. 651 (1884).

Despite the *Reese* decision, the Court did uphold on narrow grounds black voting rights where there was irrefutable evidence of private or official interference with the right to vote. The Court decided that in national elections federal authorities had the power to protect voting rights against both racially and nonracially motivated private discrimination. But once the federal government withdrew its supervision of state and federal elections after 1884, the opinion had little effect, encouraging the triumph of Jim Crow.

Williams v. Mississippi, 170 U.S. 213 (1898).

This decision illustrated how the Court's narrow construction of constitutional principle resulted in disfranchisement. The Court in *Yarbrough* found racially motivated interference by state officials or private persons in state or federal elections to be unlawful. Yet, the Court had narrowly interpreted what was an unconstitutional denial; and lawmakers skillfully exploited this construction, as this case showed. The question was whether a Mississippi law authorizing literacy tests violated the equal protection clause of the Fourteenth Amendment. Although the Court admitted that the law might effectively exclude blacks from elections, it found no evidence of discriminatory intent and therefore upheld the constitutionality of the provision. At the same time, the Court sanctioned the poll tax. The Court's reasoning was consistent with reality in at least one respect: the measures not only denied blacks the franchise but permitted the exclusion of many poor whites from the polls as well. Hence, the law on its face was not discriminatory, even though in its actual operation it was clearly so.

Guinn v. U.S., 238 U.S. 347 (1915).

An initial victory over Jim Crowism was this case, in which the Court overturned "grandfather" clauses in state law. The Court held that constitutional and legislative provisions extending the franchise only to persons whose ancestors could vote in 1866 violated the Fifteenth Amendment. In addition, the decision struck down literacy tests if they were entwined with the enforcement of the grandfather provisions. However, since there was no corresponding establishment of federal supervision, *Guinn* was primarily significant because it encouraged further litigation by the NAACP.

Nixon v. Herndon, 273 U.S. 536 (1927).

The Fourteenth Amendment prohibited formal discrimination by the state; the Court's narrow interpretation of state action, however, permitted the exclusion of blacks in primaries because a party theoretically acted as a private association. The issue in Texas was whether the exclusion of blacks from the Democratic primary by party rule constituted state action. In a few areas, including El Paso, local party leaders ignored the rule and blacks were allowed to vote as late as the 1920s. To prevent this practice, the legislature passed legislation in 1923 that excluded blacks from the primary. An El Paso resident, Dr. L. A. Nixon, challenged the law, and his case reached the U.S. Supreme Court in *Nixon v. Herndon* (1927). The Court found the law to be an unconstitutional violation of the equal-protection clause of the Fourteenth Amendment, whereupon lawmakers rewrote the provision to leave the issue again to the party itself.

Grovey v. Townsend, 295 U.S. 347 (1935).

Even though the Supreme Court twice struck down state efforts to exclude blacks from the Texas primary, Democrats finally established exclusionary provisions which were held to be constitutional. The Texas legislature empowered the state convention of the Democratic party to set the rules governing primaries, leaving the matter to the statewide Democratic bosses who had supported the original exclusionary standards. When these rules again reached the Court, the majority decided that since the state party committee was acting on behalf of the Democratic party as a private organization, no "state action" was present. Hence, there was no violation of either the Fourteenth or Fifteenth Amendment.

U.S. v. Classic, 313 U.S. 299 (1941).

By 1941, in this case the Supreme Court's majority held that the federal government could lawfully regulate a state primary in which candidates were being chosen for federal elections. The case arose from ballot tampering in New Orleans. But because Louisiana law regulated the local election, the Court's decision sanctioning federal supervision had significant implications for the status of the state-action principle.

Smith v. Allwright, 321 U.S. 649 (1944).

The Court's vacillation concerning the white primary came to an end in 1944. Three years after *U.S. v. Classic*, in *Smith v. Allwright*, the Court expressly

reversed its decision in *Grovey v. Townsend* (1935). Again at issue was the Texas white primary rules. This time, however, the Court held that the state's delegation of rule-making responsibility to the Democratic party convention was state action within the meaning of the Fifteenth Amendment. Since the convention had excluded blacks from primary elections, its rules were unconstitutional.

Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Alabama law permitted district borders in the city of Tuskegee, which excluded all but a small minority of blacks from municipal elections even though black residents constituted a large majority living within the city limits. The Court struck down the state-sanctioned electoral boundaries as a violation of the Fifteenth Amendment. This decision encouraged increased federal activism in defense of black voting rights.

South Carolina v. Katzenbach, 383 U.S. 301 (1966).

South Carolina challenged the provisions of the Voting Rights Act of 1965 involving literacy devices and the authority of federal examiners. The claim was that the Fifteenth Amendment did not empower Congress to establish such comprehensive federal supervision of voting rights, a subject the Constitution left to state control. The Supreme Court rejected this contention, upholding broad congressional power to pass legislation prohibiting discrimination in the exercise of the right to vote. In this and other cases, then, the judicial activism that had strengthened voter rights since World War II apparently had triumphed.

QUESTIONS FOR DISCUSSION

1. In terms of voting rights, what people were included in the phrase "we the people" back in the 1700s?
2. What political factors and events contributed to the gradual expansion of the electorate in the years preceding the civil war?
3. According to the author, how effective was the national program of enfranchisement of blacks through the Fourteenth and Fifteenth amendments during Reconstruction? What were the barriers to black voting rights?
4. What effect did late 1800s populism have on voting rights?
5. What was the significance of each of the following in gaining voting rights:

Guinn v. U.S.	*Gomillion v. Lightfoot*
U.S. v. Classic	The Civil Rights Act of 1964
Smith v. Allwright	The Voting Rights Act of 1965
	South Carolina v. Katzenbach

6. The author expresses his concern over the vulnerability of voting rights to political pressures. Do you think that political pressures today may be causing a decline in voting?

ESSAY SEVEN

Education and the Constitution

By Charles S. Bullock III

Introduction

Since the passage of the Northwest Ordinance by Congress in 1787, two months before the Constitution was signed, the U.S. government has had a continuing influence on public education in the nation. Although the Constitution left education policy among the powers reserved to the states, the federal government, under its powers to protect the general welfare and enforce the Bill of Rights, has had considerable influence. The Constitution has had its most significant effects on education in the last 35 years; most of the litigation involving the Constitution and education has been filed since 1950.

For most of the 35-year period, especially in the early part, school segregation has been the most prominent constitutional issue. Beginning around 1970, the education of non-English-speaking students became an issue, and in the mid-seventies, protection of the rights of women and the rights of handicapped students became prominent issues.

As federal dollars were used to ensure the implementation of policies, constitutional issues became financial issues. Arguments that the Tenth Amendment leaves educational policy to the states were swept aside in the effort by local school districts to attract federal aid for desegregation of schools and for revision of policies that discriminated against women and minorities. Moreover, there were extra funds available for compensatory education in situations where earlier policies had been discriminatory. A review of these issues, the major legislation, and the court cases pertaining to them, will show the relationship that has developed between educational policy in the nation and the U.S. Constitution.

School Desegregation

For approximately three generations, school segregation was countenanced by the Supreme Court's interpretation of the equal protection clause of the

Fourteenth Amendment—"No state shall. . .deny to any person within its jurisdiction the equal protection of the laws." From the time of *Plessy v. Ferguson* in 1896 until 1954, "separate but equal" was the law of the land. An eight-to-one majority had made it legal for public officials to segregate blacks and whites. The only limitation on racial separation was that facilities be provided to each race, though there was no agency at the federal or state level responsible for ensuring that separate facilities were in any way equal. In the 21 states that required or permitted racial segregation in schools, black facilities were typically inferior to those for whites. In most of the country, state laws prohibited requirements that schools be segregated. Nonetheless, in many urban areas outside of the South, racial isolation was almost as pervasive as in southern and border states.

Initially, suits challenging the separate-but-equal doctrine focused on the "equal" provision, since that was so obviously being ignored. Beginning in the 1930s, cases were filed that pointed out the lack of comparability in higher educational opportunities for blacks. States that required segregation in higher education usually had a limited offering of programs for their black residents. There were no state-supported black medical schools or schools of veterinary medicine. Black residents who wanted to study in these areas, as well as any other program not found at a state-supported black school, would be sent out of state, with the additional cost being borne by their home state. Beginning with *Missouri ex rel Gaines v. Canada* (1937), the Supreme Court required compliance with the "equal" portion of the separate-but-equal interpretation. Where there was no black facility offering a program desired by a black student, the state was ordered to admit the black student to the white university.

In a [1954] decision. . .the Supreme Court held that racially segregated schools. . .violated the equal protection clause.

In *Sweatt v. Painter* (1950), the Supreme Court looked beyond the mere existence of a program and, for the first time, weighed intangibles. A black Texan who wanted to study law at the University of Texas was turned away and directed to apply to a recently formed law school for blacks in Houston. The Supreme Court ruled that the presence of a black state-supported law school was not sufficient to exclude the applicant from the University of Texas. In its decision, the justices noted that the black facility lacked the reputation, the caliber of faculty, and the opportunity for enriching contacts with classmates who would be leaders in Texas legal circles that were

afforded by the University of Texas. The black facility could not be made equal to the university's prestigious law school. The university was directed to admit the applicant.

The first head-on challenge to the constitutionality of the separation came in a set of cases challenging segregation in elementary and high schools. In *Brown v. Board of Education* of Topeka (1954), the Supreme Court completed the repudiation of *Plessy*. In a remarkably brief opinion, the Court concluded that racially segregated schools could not be equal. In a decision that rested in part upon social science research concerning the consequences of segregation, the Supreme Court held that racially segregated schools were inherently discriminatory and therefore violated the equal protection clause.

While the *Brown* decision was quite explicit in finding segregation to be unacceptable, it was much less precise in prescribing corrective measures. The timetable for change was the vague "with all deliberate speed." Equally vague was specification of what constituted desegregation. Obviously, laws that whites and blacks attend separate facilities had become unconstitutional, but was it then necessary that blacks and whites go to school together, and if so, was it necessary that there be no identifiably one-race schools?

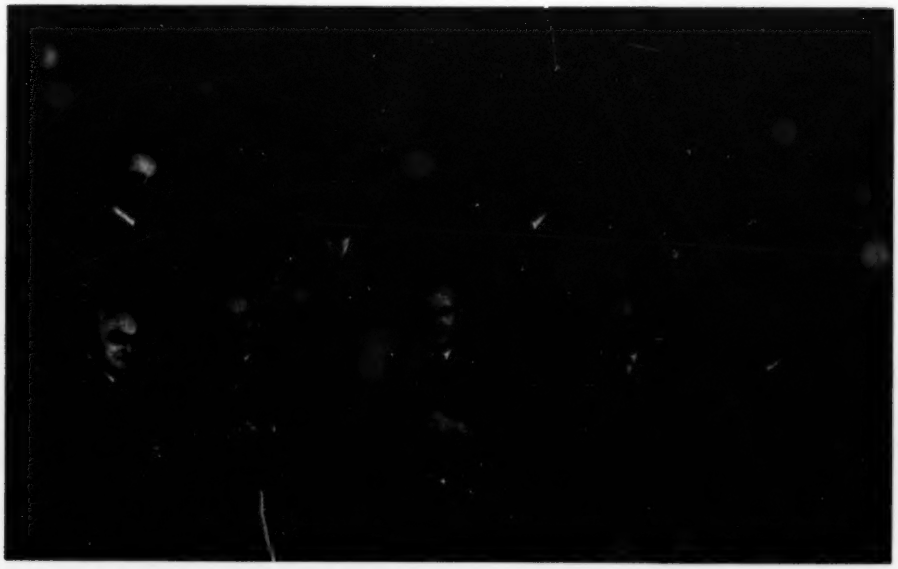
The immediate reaction to the *Brown* decision is well known. The southern legislatures embarked on a course of massive resistance,[1] passing legislation to bolster school segregation in the hopes that it would be necessary for blacks to challenge each new requirement *seriatim* or one-by-one, thereby delaying the process. If, ultimately, all efforts to legislate segregation failed, many states planned to close the public schools and provide public assistance to parents wishing to enroll their children in private institutions.

In border states and a few southern communities with small black populations, a more compliant attitude prevailed. In these communities, the *Brown* decision resulted in freedom of choice; that is, blacks who wished to do so could transfer to white schools. But little was done to disestablish the separate black schools. Only where the black population was so miniscule that there was no separate school for blacks was there an eagerness to desegregate. That eagerness stemmed from the cost savings available by incorporating the handful of blacks into the white school rather than transporting them to black schools in neighboring districts.

Defining and Enforcing *de Jure* Segregation

The Courts

The *Brown* decision was very clearly directed at segregation resulting from law. Gradually the courts, and after 1964, the Department of Health, Educa-



A photo of the famous Warren Court taken several months after the Brown v. Board of Education in Topeka *decision shows (left to right) Justices Felix Frankfurter, Hugo L. Black, Earl Warren (Chief Justice), Stanley F. Reed, William O. Douglas, Sherman Minton, Harold W. Burton, Tom C. Clark, and John N. Harlan.*

tion, and Welfare (HEW) elaborated on the general theme of the *Brown* case. Beginning in 1965, the Office of Education in HEW designed guidelines to achieve desegregation. Federal funds provided by the Elementary and Secondary Education Act of 1965 provided a financial inducement for complying with the guidelines since segregated districts did not qualify for federal aid. The guidelines initially required only a written agreement not to segregate; subsequently, it was necessary to obtain at least token desegregation under freedom of choice or by redrawing attendance zones. *Green v. County School Board* (1968) made these efforts inadequate. The *Green* decision, which echoed the 1968 administrative guidelines, mandated that school systems eliminate racially identifiable institutions. There were to be neither black schools nor white schools, "just schools." Thus 14 years after *Brown*, the Supreme Court defined "desegregation" for *de jure* schools, i.e., schools in which segregation was required by law.

Two years later, time ran out on meeting the requirement of "all deliberate speed." In *Alexander v. Holmes* (1970), the Supreme Court ordered

more than 30 Mississippi districts to desegregate in midyear. These schools had received a delay in implementing their desegregation plans in the fall of 1970, after the Nixon White House intervened. The Supreme Court expedited the review of this decision and decided that 16 years constituted too much deliberation and too little speed. Therefore, even though disruptions might result from having to reassign students and faculty over the Christmas holidays, it was required.

Action by the Justice Department and Office of Education

In several states, the most recalcitrant school systems desegregated only after the Justice Department and the Office of Education joined forces. When the Nixon administration discovered that it could not turn the clock back to 1954, it sought to complete desegregation as quickly as possible. President Nixon, who was elected largely through a southern strategy in which Senator Strom Thurmond, Republican of South Carolina, played a major part, did not want southern desegregation to be an issue in 1972 when he sought reelection. He wanted to complete the task in time for wounds to heal.

In the Justice Department-Office of Education approach, leaders of these agencies held a meeting in each state with the superintendents of all of the states' schools that remained segregated. Superintendents were told very clearly that if they did not agree to begin good faith negotiations immediately, they would be sued. Litigation would be expensive and futile. Schools had a choice. They could sign up with the representative of the Office of Education for no-nonsense negotiations designed to eliminate dual school systems, or the Justice Department was ready to sue them in a class action. The first and largest class action suit was in Georgia. It was one in which 81 school systems were sued.

Along the way, the courts cleared up another issue. In *Griffin v. Prince Edward County* (1964), the option of closing the schools in a county faced with desegregation was rejected. The Supreme Court decided that if public

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. . .by 1970, the South was the least segregated region of the country.

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schools were operated in part of the state, it would be necessary to provide them in all areas of the state.

Federal efforts succeeded to the extent that by 1970 the South was the least segregated region of the country. This was a remarkable change from only two years earlier. In 1968, 68 percent of the South's black children

were in all-black schools. In 1970, the figure had fallen to 14 percent. Since 1970, in comparison to other regions southern schools have continued to be the least segregated.

The lingering controversy of school desegregation today involves the issue of busing. Very few Americans find maintenance of racially segregated schools with the force of law to be acceptable. Many, however, balk at using buses to move black children to white schools or to send white suburban children into central city districts more heavily populated by blacks. In 1971, the Supreme Court legitimized the use of busing as a remedy. In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Court acknowledged that busing might be disruptive and unpopular. However since segregation was not a natural phenomenon but had been produced by public officials, it was insufficient to maintain a network of neighborhood schools. As long as neighborhood schooling was the rule of the day, relatively few blacks in large cities would attend schools with whites; therefore, busing might be necessary to disestablish dual school systems.

In rural areas, children of both races had been bused for years, so the effect of the *Swann* decision in the rural South was only to eliminate separate and overlapping bus routes. In urban areas, however, the impact was more substantial, since attending the neighborhood school was the norm. It has been in urban areas where opposition has lingered.

Distinguishing *de Jure* Segregation from *de Facto* Segregation

Since black children in many northern cities had as little contact with whites as did southern black children, it was only a matter of time before suits challenging segregation in northern schools were filed. From the outset, the courts distinguished between segregation that is the product of law or the actions of public officials, and that which is the product of numerous private decisions. Lawyers for northern school districts have argued that racial separation in their communities stems from an infinite number of private housing decisions. When segregation is *de facto*, i.e., not the product of law or the actions of public officials, there is no violation of the Constitution. In a growing number of northern communities, plaintiffs have demonstrated involvement of public officials in causing or maintaining racial separation in the schools. When that is shown, the segregation is *de jure* and courts can provide a remedy.

The first nonsouthern case in which plaintiffs prevailed before the Supreme Court came from Denver. In *Keyes v. School District No. 1* (1973), the Court concluded that public officials were partially responsible for the separation of Hispanic, black, and white students in at least portions of the district. In promulgating a remedy, the Court turned its attention to more than just the specific neighborhoods where public officials had been shown

to be culpable for racial isolation. The school district was directed to devise a districtwide remedy. Within a few years, the Supreme Court had also approved mandatory busing programs as a tool for desegregating northern schools guilty of *de jure* segregation (*Dayton v. Brinkman*, 1979).

The bases for finding segregation to be *de jure* in the North and West have usually involved decisions of either school officials or housing officials. Behavior of school officials that has been held unacceptable has involved placement of new schools, location of additions and temporary classrooms, and manipulation of attendance zone lines. Plaintiffs have sought to prove that school officials have deliberately directed white children toward white schools and black children to black schools.

Many children still attend classes in their neighborhoods. This neighborhood school concept was almost universal in urban areas prior to desegregation. But, if housing officials have acted so as to force minorities into ghettos, for example, through the location of public housing units, and this then results in those minorities having to attend a particular nearby school, a court may find segregation to be *de jure*.

Compliance with School Desegregation Requirements

Where minorities were relatively few, schools moved with varying speed to permit desegregation in the wake of *Brown*. In most of the South and certainly all of the Deep South, even token desegregation did not begin until federal pressure was mobilized against individual school districts. From 1954 until 1964, these pressures were generated by private plaintiffs who sued their local school system. In the absence of a court order, Deep South schools remained unchanged. Initial litigation was often directed at major cities and after several years, the plaintiffs ultimately prevailed on appeal. In response, school officials would authorize a pupil placement or a freedom of choice plan. Both techniques were designed to minimize actual desegregation. Pupil placement required blacks wishing to attend white schools to pass a battery of tests. Freedom of choice allowed those black students who requested a transfer to a white school to do so. The requests were often publicized so that employers or bankers could pressure the parents of a black child seeking a transfer to withdraw the request. In the absence of a request for a transfer, children continued to attend segregated schools.

While no Deep South school system moved to desegregate voluntarily, some complied with court directives more gracefully than others. Particularly nasty outbursts were aimed at the first black children to attend white schools in Little Rock and New Orleans. In contrast, while tension surrounded desegregation in Atlanta, there was relatively little violence. What accounts for the differences?

While the dynamics of school desegregation are complex and involve a multitude of factors, among the more important elements was the behavior of local leaders. Where political and educational leaders urged peaceful compliance, violence was minimized. Conversely, where leaders such as Arkansas governor Orville Faubus chose to capitalize upon white fears, violence occurred.

Despite the violence that accompanied the desegregation of some cities, the future was even more foreboding for rural schools, particularly those with large black enrollments. As V. O. Key observed, the urban South tended to be more liberal than its rural surroundings.[2] Whites in the black belt—predominantly rural counties with large black populations—were more racially intolerant than whites where blacks were few. The spread of desegregation followed the patterns expected. Beginning in the larger cities, desegregation gradually extended to smaller cities and suburban areas. Rural areas were more resistant to change with rural, heavily black counties being the last to comply. Many rural schools remained totally segregated until the fall of 1970,[3] and a few remain segregated even today with whites attending private schools, leaving all-black public schools.

Once federal law required the disestablishment of dual schools, differing amounts of pressure were necessary. School districts desegregated with less federal pressure when local school authorities acknowledged the constitutionality of the law, when the percentage of blacks in the population was lower, when the superintendent was appointed rather than elected, and when the population enjoyed a somewhat higher socioeconomic status.[4] Appointed superintendents incurred less risk when desegregating than did elected ones. Being one step removed from the electorate, appointed superintendents could carry out what they knew to be the law with less fear of being punished at the next election. School districts tended to respond to federal demands in ways similar to their neighbors. Thus, even a school district with a fairly low proportion of blacks might adamantly maintain segregation if it were surrounded by districts with substantially more blacks.

As school districts complied with the law and closed black schools or merged black and white schools, white parents often had a choice. They might leave their children in the newly desegregated system, or they could place their children in all-white segregation academies that had sprung up in many communities. A study by Giles and Gatlin of six Florida school districts revealed that white parents who removed their children from the public schools were more affluent and their children experienced a more significant change in their educational environment as a result of desegregation.[5]

The requirement that there be no black schools and no white schools, just schools, resulted in the complete disestablishment of segregated systems

in relatively small school systems. Frequently, in the smaller districts, the black and white elementary schools and the black and white high schools would be merged so that one facility would accommodate students in grades 1-3, a second would handle students in grades 4-6, a third facility would be the district junior high, and, finally, there would be a district high school. Even in larger districts with multiple schools, it was often feasible to approximate racial balance across schools.

Such has not been the case, North or South, in large urban districts. Orfield has argued that all but the very largest school districts could be desegregated with busing plans.[6] The unpopularity of that option has been so great that it has rarely been adopted. Indeed, since 1977 Congress has prohibited the Department of Education from requiring districtwide busing as a remedy. The Justice Department, although not barred from this solution, has shown little interest in imposing it. Where busing has been ordered in recent years, it has been at the behest of federal judges in suits brought by private plaintiffs. In large urban areas, it is still common to find some

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In large urban areas, it is still common to find some virtually all-black schools as well as some virtually all-white schools.

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virtually all-black schools as well as some virtually all-white schools. It seems unlikely that this will change in the future. Public opinion polls show that most whites are opposed to busing to achieve desegregation,[7] with attitudes split in the black community.[8]

Discrimination in Desegregated Schools

In some communities, steps to dismantle dual schools triggered stratagems to reduce black-white contact within what were then officially desegregated institutions. A number of schools instituted programs for slow students at the same time that they desegregated. Particularly popular were programs for the educable mentally retarded (EMR). By assigning disproportionate numbers of minority students to EMR classes, there were fewer blacks in regular classes. Another technique was to remove black children from schools through suspensions or expulsions. Though some systems certainly adopted one or both of these stratagems as a line of further resistance, this was not true of all schools.

There have been efforts to monitor EMR classes and change this practice. Both the U.S. Department of Education and the federal courts have

reviewed school systems to determine if they are using pupil placement and punishment for discriminatory purposes. To pass muster, EMR programs must utilize bias-free testing procedures and must demonstrate that they are improving the education offered to their participants. No longer can children be put in EMR classes simply on the recommendation of a teacher. School boards must keep extensive records on their programs for special children and on punishment practices in order to document that they are not discriminating.

Still, Bullock and Stewart,[9] Meier,[10] and Wainscott and Woodard[11] have all shown that blacks are overrepresented in EMR classes and among the students being punished. Research by these scholars has found that this overrepresentation of minorities is associated with smaller black enrollments, receipt of less federal aid, more resistance to desegregation, urbanization, and a lower percentage of blacks on the faculty.

Bilingual Education

America has often been called a melting pot, a place where immigrant groups put aside their native customs and tongues and become assimilated. A foreign-born generation might never learn English or might always speak English with an accent, but their children would typically have the same local English speech patterns as their native-born neighbors. Schools played an important role in assimilation. Immigrant schools were set up in major cities to help the foreign born overcome language problems, and for many first generation Americans, their first real exposure to English came in the schools. Children whose parents spoke only their native tongue, quickly learned English once they went off to school. Some school systems were so enthusiastic about promoting assimilation that children who conversed in their native tongues were punished. This occurred at a number of southwestern school districts where Spanish was frowned upon and in reservation schools where the speaking of Indian dialects was discouraged.

A major shift in public policy in the mid-1970s encouraged the maintenance of foreign tongues. Chinese people in San Francisco complained that the schools were ignoring their children who were not fluent in English. In *Lau v. Nichols* (1974), the Supreme Court sided with the parents and ordered school systems to devise better means of educating children whose native tongue was not English. That decree spurred the Office of Education to further implement a national origin education program begun halfheartedly in 1970. A survey to determine which school systems had large numbers of ethnic children was conducted. More than 300 school systems were identified and ordered to devise programs for educating these children.

There have been two primary approaches to bilingual education. One

has been to establish transitional programs designed to make non-English-speaking children competent in English as soon as possible. The alternative has been developing bilingual-bicultural programs that maintain the foreign language competence of participants. Bilingual-bicultural programs involve students for longer periods and often provide instruction in the child's native tongue in substantive courses such as social studies and science. As a result of the *Lau* case, school districts have had to devise educational programs in literally scores of languages.

Parents of ethnic children have not been unified in their preferences. Many, particularly Asian parents, have preferred the transitional programs and want their children to learn English as quickly as possible. On the other hand, Hispanic groups, particularly Mexican-Americans, often prefer that their children's Spanish language skills be maintained.

Most school systems have preferred the transitional programs, because they are less expensive and easier to operate. In a transitional program, it may not be necessary to employ a teacher who speaks the child's language, and fewer materials in the languages of the non-English speaking may need to be purchased. (Particularly difficult for schools has been the education of Hmong children from Indochina, who lack a written native language.) School boards would probably be more willing to operate maintenance programs if the federal government shouldered the additional cost. For several years, there was a special grant program for bilingual education, but it did not pay the full cost. With the budget reforms of 1981, the separate program ended and its funds were commingled with a variety of others to create a block grant program. Total funding for the block grant program, however, was less than the sum for the categoric programs folded into it.

Education of the Handicapped

Until quite recently, school systems made little pretense of educating children who had anything more than minor handicaps. Neither the physically nor the mentally handicapped were considered the responsibility of the public schools. If these children were to be provided with any kind of public care, it was likely to be institutional, with more custodial than educational objectives.

The impetus for change came from Congress when it passed legislation to ensure equal rights for handicapped children as well as handicapped adults. The model for this legislation was the earlier effort on the behalf of blacks in Title VI of the 1964 Civil Rights Act which prohibited discrimination on the basis of race. These rights were derived from the equal protection clause of the Fourteenth Amendment.

The key elements in educating the handicapped have been the develop-

Legislation ensuring equal rights for the handicapped has resulted in the provision of special school buses for students in wheelchairs.

ment of *individualized education plans* and *mainstreaming*. Individualized education plans involve parents and teachers in developing a set of objectives and a curriculum for each exceptional child. This has facilitated much greater parental involvement than existed before and, indeed, greater involvement than often occurs for normal children. The plan must be periodically reviewed and, as conditions warrant, modified.

Mainstreaming requires that, to the extent possible, handicapped children are to be educated in classes with the nonhandicapped. School children with minor learning disabilities may spend all but one period per day in regular classes. During that one period, they will receive specialized instruction to help overcome their learning disabilities. This might involve special instruction in reading or speech therapy. More severely handicapped children may spend only a small fraction of the day in regular classrooms. Activities such as art, drama, chorus, or physical education may provide the outlets for interaction with other children.

A third aspect of education for the handicapped is the obligation of public schools to provide an education for the handicapped from age 3 to 21. The mandate that public schools serve even youngsters with severe emotional, physical, or psychological disabilities may prove costly. For some children, one-on-one instruction is needed; for others an aide is needed to move the child from class to class, feed the child, and to care for other bodily functions.

Provisions for educating the handicapped did not meet with widespread initial opposition; few people contend that these individuals should not have an opportunity to develop their capabilities. Subsequent opposition has stemmed from economic considerations. The hiring of additional personnel and the responsibility of providing care for 18 years as opposed to 12 or 13 years for normal students have all contributed to costs. As with bilingual education, meeting federal expectations has not been facilitated by additional federal dollars. The contemporary environment in which school bond referenda are frequently defeated and in which some school systems are closed each year because they cannot adequately pay their teachers, has made the high cost of providing education to the more disabled a greater problem.

Still to be resolved is whether the congressional interpretation of the Constitution necessitates 12-month education for the handicapped. Suits have been filed in several jurisdictions claiming that the gains made by handicapped children during the 9-month school year are lost during the summer. It is generally agreed that all children experience some retrogression during that time. But, parents of the handicapped claim that unless they themselves design stimulating summer reading and educational activities, their children experience a particularly great loss. Schools have rejected these demands, noting that while a 9-month school is equal to what is provided for other children, 12 months would go well beyond what would be required by the protection clause. It is unclear how the courts will react to these demands.

Women's Rights in Schools

Title IX of the 1972 amendments to the Elementary and Secondary Education Act took the terminology of Title VI of the 1964 Civil Rights Act and made comparable provisions applicable to females. The 1972 legislation extended equal protection guarantees to the activities of females in educational settings. These guarantees involved job opportunities for women, athletic programs, and the availability of courses.

Job inequities were manifest in differential pay for women faculty who performed tasks virtually identical to those of male peers. For example, female coaches in some schools received smaller supplements than did male coaches in comparable jobs. Or, female home economics teachers were paid

less than male shop teachers. In other districts, there were obstacles to the advancement of women into higher administrative ranks.

Women's athletics programs were often less extensive than those available to males. Even when comparable outlets were available, such as basketball, the boys' team might have newer equipment and receive larger amounts

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The impact of [laws prohibiting sex discrimination] has been perhaps most visible in. . .athletics.

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of travel funds than would the girls' team. Often, girls' teams were equipped with the castoffs no longer wanted by the boys' teams.

In the third problem area, girls were prevented from taking some classes. For example, classes in auto mechanics would be reserved for boys, while girls were directed into homemaking or typing classes. A more subtle problem involved advising. Some counselors steered girls away from mathematics and science, suggesting that while boys might need training in these areas in order to go into engineering, girls would not.

In 1972, amendments prohibited each of these types of sex discrimination so that noncompliance could endanger federal funding. The impact has been perhaps most visible in the area of athletics. The number of interscholastic women's teams has increased as has the number of female participants. There has generally been less opposition to enhancing the opportunities for women faculty and students than there was to school desegregation and to the development of bilingual education programs.

An issue of particular importance to the treatment of women in higher education, which may have a far broader impact, was addressed by the Supreme Court in *Grove City v. Bell* (1984). This case held that only programs receiving federal funds were subject to rules promulgated under Title IX of the education law. A coalition of feminist and civil rights groups have petitioned Congress to overturn this decision. They urge that *all* activities of recipients of federal funds should have to conform with federal nondiscrimination laws.

Funding of Education

Traditionally, the bulk of the responsibility for funding public schools has fallen to the states in the South and to local governments in much of the rest of the country. Federal funds were available only for specialized items such as the school lunch program and vocational education. The depres-

sion of the 1930s and World War II, coupled with the postwar baby boom, resulted in an extended period during which funding for the capital needs of schools was sharply circumscribed. The financial strain experienced by many school districts prompted a move to tap federal funds for public education. Whether the federal government should become more active, and if so, what needs it should support, were debated extensively by Congress during the 1950s. The issue was finally resolved in the Elementary and Secondary Act (ESEA) of 1965, which ushered in a major new role for the federal government in the sphere of public education.

In the previous year, one of the stumbling blocks to a larger federal contribution was removed when Title VI of the Civil Rights Act prohibited federal funding for segregated schools. The way in which federal aid under ESEA was distributed allayed concerns of the supporters of parochial education, which had been another obstacle to federal aid.

The main effect of the 1965 legislation has been to permit the use of federal funds to equalize educational opportunities. The most important part of ESEA was Title I, which provided funding to schools that enrolled children from poor families. The threshold of poverty was set high enough so that most systems qualified for some aid, although poorer systems got larger amounts of federal funds. The concerns of parochial school educators were addressed by tying the funding to the student rather than to the institution. Private schools that enrolled poor children were allowed to participate in Title I. Over the years, Title I funding has been used for enrichment programs, to improve reading skills, and to acquire educational materials, etc.

Earlier proposals had suggested that the federal government help with the construction of classrooms for the growing number of students. There had also been proposals for federal salary supplements for teachers. These options were not included in the legislation enacted.

In the wake of ESEA, a number of categorical grants for education were developed. Some of these helped support programs mandated by legislation described earlier in this paper. Thus, there was funding to help schools that were undergoing segregation and for bilingual education. Preschool education for the poor through the Head Start program has been another major effect.

Given the compensatory nature of the major federal funding effort, it was not surprising that poor states have been the largest beneficiaries. Mississippi, which has the nation's lowest per capita income, has had the largest share of its total education budget provided by the federal government. More affluent states have relied relatively little on federal education aid.

Another avenue by which federal authority might have become involved in the financing of public schools involved the reallocation of property-

based tax revenues among school districts. Public schools in all but one state rely to some degree on local funding. Some communities have extensive revenue resources because of commercial or industrial property on which they can levy taxes. Other districts have children whose needs put great demands upon resources available, yet the property upon which their tax levy is based generates little revenue. Beginning in California, suits were filed in a number of states seeking to equalize the availability of property-based revenues. The thrust of the suits was to reallocate revenues produced in affluent districts so that poorer districts would have additional funding. The California litigation, *Serrano v. Priest* (1971), challenged the inequities in local revenue on the basis that it violated the equal protection clauses of the state and U.S. constitutions. In the course of the litigation, it was pointed out that one school district provided more than twice as much per pupil as did some neighboring ones. The state supreme court found for the plaintiffs in this case.

Two years later, the United States Supreme Court confronted the issue of whether the equal protection clause of the U.S. Constitution could countenance disparities in local revenue support for education. In the Texas case, *San Antonio Independent School District v. Rodriguez* (1973), the Court decided that it would be unnecessary to equalize local support.

Federal programs such as Title I have promoted financial equalization to a degree, but there is no federal constitutional mandate for school systems to have equal numbers of dollars per pupil, although some state courts have embraced the *Serrano* decision. Perhaps, if the criteria were to be equal performance rather than equal opportunity, it might be necessary to see that poor districts spend more per student than wealthier ones, since students from impoverished homes often have greater needs.

Conclusion

Clearly, U.S. educational policy is shaped by decisions made in Washington under the U.S. Constitution to a much greater extent than was true 35 years ago. While the national government has not supplanted local and state decision makers in education, its dictates are supreme in some areas and the effects have been wide ranging. For example, federal statutes have stipulated that states and local districts (1) cannot operate *de jure* segregated schools, (2) must provide for the educational needs of the handicapped, and (3) must provide equal opportunities to women and linguistic minorities. These statutes and their supporting judicial decisions have brought an end to separate-but-equal schools, increased opportunities for women to pursue a wider range of academic and extracurricular options, forced public schools to meet

the educational needs of the handicapped, and improved the education of non-English-speaking students.

Federal money offered as inducement for compliance with the law is responsible for many improvements, and the money continues to flow, though in much smaller amounts than that provided by local and/or state governments. Nonetheless, the appeal of extra revenue has been sufficient to induce many school districts to adopt federal policy guidelines. For example, Title I money prompted many districts to design and implement school

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Federal money offered as an inducement for compliance with the law is responsible for many improvements. . . .

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desegregation proposals. Funds from categorical programs such as the Emergency School Aid Act and the bilingual education program helped defer additional costs associated with school desegregation and educating children whose native tongue was not English.

The beauty of the federal inducement approach has been that even providing relatively few dollars has made school districts meet a variety of programmatic demands to honor guidelines for desegregation, the treatment of women, the handicapped, and national origin minorities.

The *Grove City* decision seemed to narrow federal grant coverage when it ruled that only programs receiving federal money must be free of sex discrimination. The Court has not applied similar logic to school policies on desegregation, education of the handicapped, and bilingual education, but the Department of Education has. If *Grove City*'s logic applies in these other realms, the drying up of federal aid to education during the Reagan administration will mean fewer programs in which equality of treatment will be ensured by federal law.

Still Unresolved

The changes produced by a larger federal presence in the classroom under the Fourteenth Amendment have raised issues that will probably not be resolved until our nation's third century. One issue currently before Congress is whether the Supreme Court erred in *Grove City*. Opponents are urging Congress to reverse that decision by enacting the Civil Rights Restoration Act, thereby reestablishing broader federal influence. The pro-*Grove City* forces ask, though, why federal funds that constitute a small share of most school budgets should force institutions to observe such a wide range of federal edicts?

Also left unresolved is the problem of educating the handicapped, a problem of equal rights now largely mired down in economics. Since funds for education are limited in most of the country, and since per pupil expenditures are greater for the handicapped than for other students, critics ask whether or not educating the handicapped may shortchange normal students. Parents of the handicapped argue that each child has a right to a public education regardless of cost. Moreover, even among the nonhandicapped, resources are not distributed equally among all students.

Continuing questions about language-origin minorities have a more emotional than economic basis. Some who favor transitional programs feel strongly that those who live in this country should learn English. They fear that if the diverse groups who come to our shores are not amalgamated, giving up their ethnic separatism, the nation will be weakened. They point to separatist movements in Canada, Britain, and Spain as evidence of the potential for disruption caused by minorities not assimilated in the melting pot.

A lingering question in school desegregation is whether to continue trying to achieve racial balance in schools or to acknowledge that within large cities some schools will be disproportionately populated by minority students. The resources necessary to transport students, thus reducing racial isolation, might be better spent improving ghetto schools. Also, there is a chance that attempts to desegregate city schools would accelerate white flight to the suburbs and thus be self-defeating.

The traditional perspective of civil rights groups has been that since white schools tend to be better maintained, staffed by better instructors, and produce a higher level of student performance on standardized tests, minority students should be able to attend these facilities. However, growing evidence that with committed leadership, ghetto schools can become showcase institutions with graduates as good as those from premier schools raises new questions about how much busing enhances the quality of education available to minorities.

Finally, the contradictions between affirmative action and the maintenance of quality in schools as well as in the work force, must still be resolved. Critics of affirmative action are concerned that in the process of guaranteeing equal opportunity for all, less qualified minorities may be hired or promoted before more qualified whites. Tracking programs in schools that are intended to fit a student's education to his or her abilities have come in for similar criticism. While the criteria used to classify students are as free of bias as possible, what happens if minority students are overrepresented in lower tracks, while whites are overrepresented in higher tracks? Should these programs be discontinued?

Educational opportunities for all citizens of the United States are far greater today than before the government brought pressure to bear on local school systems under the Fourteenth Amendment to the Constitution. That much is clear and undebatable. Not so clear are the solutions to problems arising from equal protection in education. The search for constitutional and practical solutions will doubtless continue for many years.

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Alexander v. Holmes, 396 U.S. 19 (1970).
Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971).
Keyes v. School District No. 1, 413 U.S. 189 (1973).
Lau v. Nichols, 414 U.S. 563 (1974).
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979).
Grove City v. Bell, 104 S. Ct. 1211 (1984).

SUMMARY OF SELECTED CASES

Brown v. Board of Education, 347 U.S. 483 (1954).

The father of a black child in Topeka, Kansas, challenged the local ordinance that forced his child to walk past a white school in order to reach the black school. Separate but equal schools, which had characterized 21 states, were held to be inherently unequal and in violation of the Equal Protection Clause of the U.S. Constitution. School systems were ordered to desegregate with all deliberate speed.

Green v. County School Board, 391 U.S. 430 (1968).

The response of most southern schools was to make minimal changes. The result of a successful challenge to the maintenance of separate but equal schools typically left some all-black schools, some all-white schools, and a few white schools that had token black enrollments. In *Green*, the Supreme Court clarified what was necessary to meet demands that schools desegregate. By ordering that there be no white schools and no black schools, just schools, the court indicated that pupil placement and freedom of choice were insufficient to comply with the federal Equal Protection Clause. Smaller school systems had to attain racial balance among their schools as a result of this decision.

Alexander v. Holmes, 396 U.S. 19 (1970).

Some 30 Mississippi school districts sought a further delay in the implementation of their desegregation plans. Senator John Stennis pressured the Nixon administration to support these requests by threatening to leave Washington during the debate on the highly controversial anti-ballistic missile (ABM) system should the schools be forced to desegregate. At the last minute, the Justice Department sided with the Mississippi school districts and they were granted a reprieve. The private plaintiffs in the case appealed to the Supreme Court. The schools were ordered to desegregate in midyear by the Supreme Court, thereby ending the era of "all deliberate speed" as the standard for when school districts should disestablish dual schools.

Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971).

In Charlotte, North Carolina, as in many urban school systems, pairing plans that merged nearby black and white schools, and even redrawing school attendance lines left a number of schools entirely or nearly one-race schools. Plaintiffs asked for a desegregation plan that would transfer students in order to promote greater racial balance throughout the district. The Supreme Court ordered the initiation of a busing plan in order to redistribute students, rejecting defendants' desire to stay with a neighborhood school arrangement.

Keyes v. School District No. 1, 413 U.S. 189 (1973).

The Supreme Court concluded that even though there had been no state or local statute requiring racial separation in the schools of Denver, the racial isolation

found there was the result of government action. Decisions by school officials in locating new schools, placing temporary classrooms, drawing attendance zones, and so forth, were found to have been done with an intent to keep Anglo students separated from black and Hispanic students. This was the first Supreme Court decision ordering desegregation of a school system that had not previously been segregated as a result of state or local legislation. In devising a plan, the entire city was to be considered and not just those areas in which there had been evidence of school board actions to promote racial isolation.

Lau v. Nichols, 414 U.S. 563 (1974).

In *Lau*, Chinese parents sued the San Francisco school district for failing to educate their children. School districts were ordered to meet the needs of children for whom the native tongue was not English. The Office for Civil Rights of the Department of Health, Education, and Welfare, which had not implemented its 1970 regulations for the instruction of children whose primary language was not English, undertook a survey to identify schools that were probably not in compliance with this policy requirement. Following the survey, schools found to have deficient programs were ordered to take remedial action.

Grove City v. Bell, 104 S. Ct. 1211 (1984).

The issue here was whether a college that received a small amount of federal funds was required to meet Title IX (sex discrimination) standards in all aspects of its operation, or only in areas that directly benefited from federal aid. The Supreme Court adopted the narrow interpretation. Thus, for example, if there are federal loan guarantees, the student loan operation must be free of discrimination. If, however, the drama department or the public relations department receives no federal aid, federal authorities will not investigate claims of discrimination in these areas.

QUESTIONS FOR DISCUSSION

1. How did changes in the Supreme Court's interpretation of the meaning of the equal protection clause of the Fourteenth Amendment affect school segregation cases in 1937, 1950, and 1954?
2. How does *de jure* segregation differ from *de facto* segregation? Where was each type of segregation most prominent?
3. What was the significance of the 1974 Supreme Court decision in *Lau v. Nichols*?
4. What were the effects of the 1972 legislation which extended "equal protection" in education to females?

5. How have "Constitutional issues become financial issues" in regard to education since 1970?
6. What are your views regarding the current unresolved arguments over
   a. providing costly educational facilities for handicapped students.
   b. the implications of the *Grove City* case.
   c. the effects of bilingual education.
   d. conflicts between affirmative action and quality education programs.

ESSAY EIGHT

Orwellian Constitutional Issues: Information Privacy, Security, and the New Technology

By John T. Soma and Susan J. Oran

Introduction

Can a set of laws drafted with a quill pen nearly 200 years ago provide appropriate guidance today in a society where the same document would be written with a microcomputer? Is the Constitution capable of continuing to provide protection against threats to civil liberties brought about by technological advances?

It was the Framers' intent to fashion an instrument of government that would work for all future generations whatever the changes in human conditions. For the most part, this intent, coupled with the foresight of the Framers, resulted in a constitution that has withstood the tests of time, although challenges to the enduring principles of the Constitution presented by today's rapid technological advancements are surely among its most severe tests.

One of society's most cherished rights is the right to privacy. However, today many people perceive rapid technological advancement, especially computers, as real threats to that privacy. Many have expressed concern that the computer, with its limitless capacity for storing, retrieving, and transferring information, may produce a surveillance system that would

Challenges to the enduring principles of the Constitution presented by today's rapid technological advancements are surely among its most severe tests.

transform society into a transparent world, a world in which privacy would be a term of the past.

George Orwell, in his insightful novel, *1984*,[1] depicts a society where privacy no longer exists. Technological surveillance systems have eradicated

any essence of privacy, and a once democratic society has been transformed into a totalitarian regime. Its constitution has ceased to provide any guidance or protection. Given the present sophistication of information technology, are we drifting toward an Orwellian society? Can our constitutional government withstand the effects of technological progress? Or will it become an Orwellian society?

The threat of technology to individual privacy rights under the U.S. Constitution is a viable concern in 1987, and an examination of the historical development of the right to privacy will show why. The right to individual privacy is not expressly stated in the U.S. Constitution; instead, the protection of privacy has evolved from the Fourth Amendment and court decisions through a process of balancing individual civil liberties against the government's or the public's right to know. Privacy interests are balanced against various competing interests, and the balance has shifted in light of particular issues. In an oft-quoted dissent in the 1928 decision of *Olmstead v. United States*, Justice Brandeis stated that privacy is "conferred, against government" and is "the right to be let alone." A more expansive and usable definition is that proposed by Alan Westin in a landmark analysis entitled *Privacy and Freedom*: "[Privacy is the] claim of individuals, groups, or institutions to determine for themselves, when, how, and to what extent information about them is communicated to others."[2] Under both definitions, having a right to control the flow of personal information about oneself is vital to the individual's development, the enjoyment of intimacy, and the securing of confidential advice when needed.

On the other hand, organized society, representing the rights of its citizens, also has certain rights to limit privacy. Governments must obtain considerable information from their members to provide the services (for example, to solve crimes) its citizens demand. Governments also must collect the statistical data needed for social and economic policies. A delicate balance exists. The greater the extent of the benefits to society if the system is used properly, the greater the cost if the system is misused. Since knowledge is power, the potential dangers today of complex gathering, storage, and retrieval and distribution systems are awesome.

Individuals reasonably expect a right to privacy. Government reasonably expects a right to gather information to better govern these individuals. An imbalance of these rights, tipped against the individual and in favor of increasing bureaucratic control through the maintenance of vast personal data banks, could well lead our society in the direction Orwell described.

Privacy and the Constitution

The written concept and expression, "right to privacy," originated in an 1890 *Harvard Law Review* article coauthored by Samuel D. Warren and

Justice Louis D. Brandeis, later to become a Supreme Court justice.[3] Thirty-eight years later, that privacy was specifically defined by Justice Brandeis: "The right to be let alone is the most comprehensive of rights and the right most valued in civilized man" (*Olmstead v. U.S.* 1928). This right to privacy has been reinforced by interpretations of the meaning of several amendments to the Constitution. The Supreme Court, in the 1958 decision of *NAACP v. Alabama*, found that there was a "vital relationship between freedom to associate and privacy in one's associations" and that the NAACP was protected by the First and Fourteenth Amendments in the "right of the members to pursue their lawful private interests privately. . . ."

In 1965, the *Griswold v. Connecticut* decision specifically held that a constitutional right to privacy exists. In that decision, a state statute making it a crime to prescribe or use contraceptive devices was struck down, and the right to privacy was found to emanate from further illumination of the First, Third, Fifth, and Ninth amendments.

Expanding the right to privacy, the Court held in the 1973 decision of *Roe v. Wade* that privacy includes the right to abortion. The right to a reasonable expectation of privacy was the standard applied by the Supreme Court in the 1967 decision of *Katz v. U.S.* which dealt with illegal wiretaps. *Katz* held that the Fourth Amendment protects people and not simply "areas" against unreasonable searches and seizures. In 1986, however, the Supreme Court in *Bowers v. Hardwick* upheld a Georgia statute that makes it a crime to engage in private consensual sodomy, thus reducing privacy rights.

Computers Complicate the Privacy Issue

U.S. taxes created the computer. The first electronic computer, ENIAC, was developed in 1946 for the U.S. Army at taxpayers' expense. In 1955, almost all of the nation's 1,000 computers were owned by the federal government. While computers were used to a limited extent, no one was concerned with the collection of vast amounts of information, because the sheer volume of data collected by government agencies and business organizations made it unprofitable to pull that data together. Until the common use of high-speed computing systems, an individual's privacy was protected *de facto*

Intrusions of privacy today are not limited to government and business.

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by the inertia of human filing systems and necessarily decentralized information. Furthermore, the amount of information that could be processed was limited.

Prior to the "information revolution," when individuals or organizations were in need of certain facts pertaining to an individual, they would contact the source personally. The individual could withhold the information if the intrusions were unwarranted, and at the same time knew fully who wanted the data. Today, the centralization of information and the ability to connect data bases, coupled with the computer's capacity to handle considerable amounts of information at high speeds, realistically threaten an individual's ability to protect his or her privacy.

Intrusions into privacy today are not limited to government and businesses. Individual users, linking home computers with large computer systems accessible by phone, have introduced an invasion of privacy, the extent of which was unimaginable in the past. The American Civil Liberties Union (ACLU) reported to Congress in 1984 that the "privacy questions raised by the new telecommunications age represent the single most important issue facing Congress today." The resulting issues involve more than a need to correct outdated and incomplete statutes. These issues involve basic social issues—including home life and personal financial information—all of which substantially affect not only the communications industry, but most of society.

The Proposed Federal Data Center

A landmark confrontation between computers and privacy occurred in 1966 when Congress proposed the establishment of the Federal Data Center, a place where all of the files and records of a score of executive branch agencies would be combined. In the public's view, the data center would be the start of a central file of dossiers on every person in the country, all too centralized and all too accessible. Many feared that the computers could not think, could not forget, and could not take into account an individual's personal growth and consequent changes.

Vance Packard expressed that fear as follows:

> The central data bank threatens to encourage a depersonalization of the American way of life. Americans increasingly and rightly resent their being numbers, controlled by a computer. . .students at universities resent having their exams machine graded, and their I.D. numbers printed twice as large as their names. . .(Hearings before the House Governmental Operations Committee, 1966).[4]

The government would have had in its proposed dossier file an immensely powerful tool for controlling its citizens, and the year 1966 was full of public outcries about such "big brother" technology. A *Washington Post* headline read, "Center for Data on Everyone Recommended." "Apparently no secrets would be kept from the data center," the *Post* article concluded. Even the conservative *U.S. News & World Report* was alarmed. In an article, "A

Government Watch on 200,000,000 Americans," *U.S. News & World Report* in 1966 warned: "Your life story may be on file with the government before long, subject to official scrutiny at the push of a button." The Federal Data Center was feared basically because of (1) the loss of anonymity, (2) increased depersonalization of social values, (3) erroneous treatment, (4) unfair treatment, and (5) potential for hostile treatment. The Federal Data Center proposal was dropped.

Privacy and Personal Finances

Consumer Credit Surveillance

The next time computers and privacy rights collided legally was in 1970 when Congress, goaded by horror stories of lives ruined and reputations hopelessly tarnished, passed an act affecting the reporting of credit. The credit reporting industry had been boasting about its ability to produce a dossier on each man, woman, and child in the United States. The TRW Credit Data Corporation of Los Angeles, California, was the first, having begun its operation in 1965. The stated objectives of TRW were to deal with much larger volumes of data than were previously technologically feasible.

In 1965, consumer credit surveillance represented an elaborate mechanism for compiling and communicating highly pertinent facts about individuals, without any constraints imposed by law over the activities of the credit bureaus. Bureaus were not even legally obliged to report accurately, remaining outside the purview of legislation on libel and slander. The correcting of blatantly inaccurate information remained wholly at their discretion.

Most of the criticism regarding the invasion of privacy was attributed to credit reporting. The most strenuous objections dealt with reporting on a person's character and life-style, especially information associated with reports for purposes of employment, insurance, and tenancy.

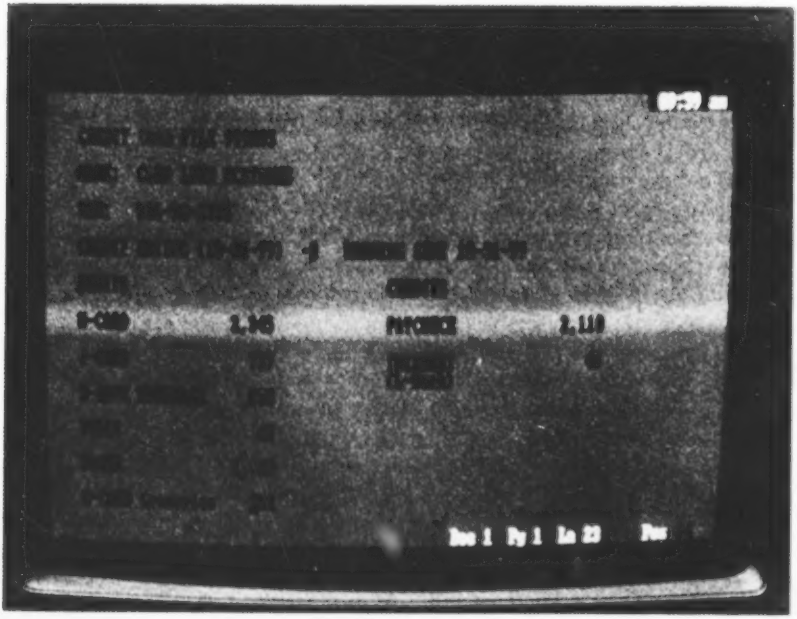
Nearly as great has been the more general indignation that information on essentially personal matters was being bought, stored, collated, and sold wholly as a business proposition, without knowledge or control by the persons to whom this information referred.

For years, the credit reporting industry successfully lobbied to prevent the enactment of legislation that would have regulated credit reporting practices. Finally, in 1970, the first national legislation regulating credit bureaus was passed and appropriately entitled The Fair Credit Reporting Act.

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) is a complex document which (1) limits the purposes for which credit reports can be drawn from the broadly

stated criteria of any "legitimate" business purpose; (2) limits the length of time that derogatory information can be retained in files (bankruptcy information may be retained no longer than 14 years, other derogatory information may be retained no longer than 7 years); and (3) requires firms rejecting credit applications because of credit reports to refer the consumer to the issuing bureau. While these are its strengths, the act has corresponding weaknesses.



Consumer credit surveillance systems were unregulated for many years.

Except for the statute of limitations on derogatory information, the act does not constrain the credit bureaus from collecting any information which they deem useful. It does not constrain credit bureaus from selling reports on individuals to any of the main business customers who now comprise the bulk of their business. Enforceability of the act is troublesome because a violation must occur before the enforcement process is initiated. These weaknesses may make the Fair Credit Reporting Act seem to be a valiant effort at regulation, but by no means a solution to the problem of the invasion of individuals' privacy by credit bureaus.

Privacy and Telecommunications

The clearest privacy issue pertaining to telecommunications has been the extent to which governmental or private entities may intercept or "overhear" electronic transmissions. Expanding computer technology, coupled with the rapid developments in telecommunications technology, has drastically changed the manner in which information is stored and transmitted. These technological advances began outdistancing laws pertaining to privacy safeguards against governmental or private intrusion into personal communications systems.

The telephone used to consist of voice transmission conveyed exclusively over wires, but now no longer relies on wire. Virtually all transmissions of any distance involve microwave broadcasts, possibly using satellites interspersed with traditional wires. A major use of telephones today includes the electronic transmission of financial data. Digital communications of computer data and nonverbal messages represent forms of telecommunications that were not present when current laws were enacted. Data communication may take the form of a transfer of raw data between computer systems or a local computer transmitting sales and inventory statistics to a central processing center. A pressing issue has been whether nonverbal communication, as compared with verbal communication, is entitled to the same or a subordinate level of privacy protection.

Many electronic communications have been exposed to interception or "eavesdropping" by unauthorized third parties without legal restrictions. Only two federal statutes placed limited restrictions on such interceptions, whether conducted by the government or by private individuals, and these statutes failed to provide adequate protection in an advanced telecommunications environment. The Communications Act of 1935 regulated the broadcast industry and prohibited intercepting and divulging radio communications. A second statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, primarily applies to wiretapping and eavesdropping of voice communications. Title III defines an "intercept" as the "aural acquisition of the contents of any wire or oral communications."

Fourth Amendment Guarantees

For governmental interceptions, even without statutory limitations, Fourth Amendment search and seizure rules have applied to the interception of electronic communications. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In the absence of consent by the people who are subject to electronic interception, probable cause and often a search warrant is required. These requirements are imposed because

the Supreme Court has interpreted the Constitution as guaranteeing an individual a reasonable expectation of privacy.

This reasonable expectation of privacy doctrine has its limits, however, depending on the nature of the information sought and the type of communication involved. The content of telephone conversations, for example, is protected by the Fourth Amendment. But, in 1979 the Supreme Court ruled in *Smith v. Maryland* that local police, in a case involving obscene phone calls, did not violate the Fourth Amendment right of Michael Lee Smith. At police request, the phone company placed a pen register on Smith's line to record the numbers dialed without first obtaining a search warrant. The Court reasoned that Smith did not have a *reasonable expectation* that the numbers he dialed were private; that phone companies generally record numbers, for example, for billing purposes.

The Privacy Act of 1974

For many years, the Privacy Act of 1974 was the major legislation protecting individual privacy in federal records. Under the law, the government may release information on an individual to other federal agencies or the public only

1. with the individual's written consent;
2. in response to a court order, a request by Congress or a specific written request from the head of an agency for law enforcement purposes;
3. to the Bureau of the Census, National Archives, or to other researchers (if the information did not name individuals or otherwise identify them);
4. to another person, in "compelling circumstances affecting the health or safety of an individual";
5. for a "routine use" of the record (a record on an individual may be disclosed "for a purpose which is compatible with the purpose for which it was collected"); and
6. if required under a separate law, for instance, the Freedom of Information Act.

In reality, most federal agencies have had little trouble in meeting these nebulous standards, in particular the "routine use" provision.

With regard to the release of information, federal agencies have been required to inform the individual of the names of each agency or authority requesting the information, to determine whether the request was voluntary or mandatory, and then to determine the intended uses for the infor-

mation. In addition, the agency has had to publish an annual notice of each record system it maintained, including

1. the name of the system;
2. its location;
3. the categories of data files maintained;
4. routine uses and users;
5. its storage policies;
6. the retrieval method(s);
7. access control;
8. retention and disposal of data policies;
9. procedures to notify individuals as to the existence of, and requests for their files; and
10. inspection and challenge procedures for reviewing information which is obtained from the Organization for Economic Cooperation and Development.

In spite of the 1974 Privacy Act prohibitions of the free exchange of personal information by federal agencies, many exchanges have occurred. For example, at the time of the writing of the Privacy Act in 1974, Congress, in a separate law, created a Parent Locator Service in the United States Department of Health, Education and Welfare. This service was authorized to query *any* of the government's computer systems to track down a parent who is not supporting his or her children, using as its prime sources of last known addresses the Social Security Administration and the Internal Revenue Service.

The 1974 Privacy Act established minimum standards that allowed individuals to see and correct their own federal public records. But there was one gaping hole in that protection: the vast majority of records are held by private firms. While Congress passed legislation limiting the use of records held by banks, credit bureaus, and educational institutions, there remained many private nonfinancial institutions free from restrictions.

State Treatment of Privacy

One reason that the U.S. Constitution has been such a difficult tool for providing relief in the dilemma of privacy versus technology is that the right to privacy is not generally spelled out. Several state constitutions have explicitly provided for the right to personal privacy. Examples are Alaska, California, and South Carolina, where privacy is guaranteed as an inalienable right.

In 1967, in *Katz v. United States*, the Supreme Court held that privacy is essentially left to the law of individual states. However, because only

12 states have constitutional provisions which expressly protect privacy, the overall legal protection of privacy is limited and inconsistent. The experiences of the states indicate that specific state constitutional privacy provisions greatly aid individuals by adding a degree of protection from outside intrusion into devices like computer data banks.

An analysis of the different state solutions to the privacy dilemma suggests that the most comprehensive approach to the protection of privacy is for a state to add a "package" of privacy measures to their respective state constitutions. Such a privacy package ideally has three essential elements. First, there should be a provision relating to the interception of communication normally included in sections on searches and seizures. Second, a free-standing right of privacy should be stated, in a separate section of the state constitution dealing only with the right of privacy (like Alaska, California, and Montana) as protection from governmental intrusions. Finally, constitutional language should be added, where necessary, to ensure that the courts and legislature have a mandate to fashion remedies against intrusions by the private sector. It is as important to legislate concerning private data banks as it is to legislate concerning government data banks.

Data Matching: Contributions and Dangers

Computer matching, sometimes referred to as "cross-matching," is a technique used by government investigators to find fraud. In this technology, computers "talk" to each other to compare information. Generally, matching entails the computer comparison of two lists to find anomalies that would indicate fraud.

In Massachusetts, state welfare officials have compared recipient rolls for welfare, medicaid, food stamps, and other benefit programs against bank account records to find beneficiaries who have exceeded their legal asset limit. The Health and Human Services Department has matched welfare rolls against lists of federal employees and compared the employee lists with lists of individuals who have defaulted on student loans. One department compares medicaid and medicare death files to social security payment records to uncover payments to people who have died.

Computer matching. . . can be. . . unduly intrusive into an individual's privacy. . . .

There are both advantages and disadvantages to the matching technique. Supporters believe that matching is a cost-effective and efficient way to

uncover fraud in federal programs without unreasonably intruding on individual privacy. Critics argue that even if each individual match can be justified, the cumulative uses of computer matching can constitute a serious invasion of privacy. Fourth Amendment protections may be undermined by matching, contend the critics, since the records of all individuals in a program are searched, not only those for whom program administrators have reason to suspect criminal activity.

There is an obvious problem in balancing competing interests: finding waste and fraud versus maintaining individual privacy. A critic of matching, Senator William Cohen, expressed his concern that the privacy implications of the growing use of matching are being overlooked. He stated that as you "look at each case, you can make a reasonable case for an exemption from our privacy law. . . .We need to stand back and take a broader view. . . .There is another pressure [besides looking for fraud], more constitutional, more indigenous to our society, which is not being felt at this time: the need to protect privacy in our technological society."[5]

Computer matching can serve a useful public purpose. It can also be construed as unduly intrusive into an individual's privacy, especially when the information, literally matched, produces some bizarre intrusions into privacy. Two real-life scenarios help illustrate this point.

Joe Eaton of Miami was stunned to find himself listed among the targets of the IRS's Operation Leprechaun, which spied on the private lives of various taxpayers in Florida. Under the Federal Privacy Act, he requested a copy of his file. The request was initially denied because his file remained part of a pending investigation. On appeal to the tax commissioner's office, he received his file. To his amazement, Eaton had turned up in the IRS file because a young man on trial for drug violations had Eaton's name on a piece of paper in his wallet. The reason for that was interesting. Eaton is a federal judge in Miami, and the youth was one of more than 5,000 who had appeared before him. That was their only connection.

Jean Benacchio of Long Island, New York, was unaware of the government's large computer systems and their capability for matching until she was detained by U.S. Customs Service agents in an airport. Her name had been entered into the Customs computer system of suspects when a 1974 investigation by the Federal Drug Enforcement Administration recorded that she was seen with a person suspected of international drug trafficking. The investigation subsequently cleared her name, but her name remained in the computer. She had to undergo humiliating searches each time she entered the United States by airplane. This was more than a minor inconvenience because she traveled to Canada quite frequently to visit her fiance. In 1976, she was involuntarily removed from an airplane, forced to disrobe, and

searched without explanation. Finally, after 18 months she succeeded in getting her name erased from the drug agency computer.

Computer matching could be limited so that most of the information gathered is relevant to one particular purpose. If not, today's technological capability could lead to computer matching that invades privacy to an extent never before contemplated. It could make George Orwell's Oceania Society look like a haven of privacy.

A Matching Scenario in the Future

The setting is a record-controlled society in a United States suburb. At 7:00 a.m., Joe Bernard wakes up, showers, and eats breakfast. Already, heat, light, and water records fed directly from his home to the Orwell City Utility Corporation (for billing and use analysis) provide data that can establish when Bernard woke up and can track his movements about the house.

Driving downtown, Bernard reaches the turnpike tollgate. His license plate is automatically scanned by a television camera, and his number is sent instantaneously to a computer containing data on stolen cars and wanted persons. Bernard, if he is on one of these lists, will be approached before he can shift into second gear.

As he stops at the tollgate, Bernard places his right thumb in front of the scanning camera and recites his name and social security number into a microphone. In this cashless, automated society, Bernard has just used his thumbprint, voiceprint, and personal identification number to satisfy his turnpike debt. All of Bernard's regular continuing obligations are automatically paid out of his account, such as his mortgage, installment loans, insurance premiums, and membership dues.

Every significant movement and transaction of Bernard's life has produced a permanent record in a computer memory system. As Bernard spends, travels, or even just fixes breakfast, he leaves an intransmutable and centralized documentary trail behind. Bernard's privacy is clearly imperiled.

Besides a financial file, three other master files are kept on every citizen such as Bernard. These files may be categorized as educational, employment, and national citizenship. For purposes of economic forecasting, demographic studies and behavioral prediction, the data base that this dossier society has created provides unequaled opportunities for research and policy analysis.

On the surface, this is an efficient, practical system. The drawback is that privacy must be sacrificed. Crucial elements of privacy, such as partial anonymity, limited circulation of personal information, and confidence in private intimate relationships are the casualties in what is sometimes referred to as a "dossier society."

You may ask: Can the information gathering in the scenario be feasible? Consider this technological development. In 1968, the Precision Instrument

In a credit card society, is there any guarantee of privacy?

Company developed a data memory process that used a one-watt continuous wave argon laser to burn pits in the opaque coating of plastic computer tape. The laser was so precise and could be focused so intensely that each pit was only one micron (.0000039 inch) in size. Where normal recording had been about 5,600 bits of information per inch of magnetic tape, this laser process put 645,000,000 bits on each inch. The recording process was 12,000,000 bits per second.

In the 1968 dossier-conscious society, the laser memory system meant that a single 4,800-foot reel of one-inch tape could contain about 20 double-spaced typed pages of data on every person in the United States. It would only take four minutes to retrieve a person's dossier. With the computer's capability to store, retrieve, match, and analyze data, the issue of disclosure becomes more complex. In the near future, with rapid advancements in technological feasibility, the dossier society could virtually eliminate the reality of the term "privacy."

Restraints on Disclosure of Personal Data

There have been relatively few legal restraints on governmental collection of data where the data collected were relevant to an agency's activity and

virtually no restrictions on a private individual's search for data. If an individual wanted to find out what had been collected about him or her or about others by the government, the Freedom of Information Act (FOIA) of 1967 established procedures and substantive standards for the release of governmental information. FOIA was passed in order to force federal agencies to reveal their records, procedures, and statements of policy to requesting members of the public, and it provided that each agency must publish a description of the place and method by which the public could obtain such information. The release of certain information was subject to exceptions where the release would

1. constitute a "clearly unwarranted invasion of personal privacy";
2. jeopardize national defense matters;
3. impinge upon internal personnel rules;
4. release confidential financial information or trade secrets, personnel and medical files, geological information, and inter- and intra-office agency memoranda; or
5. reveal investigatory records that could be obtained only by subpoena.

Judicial Decisions

A significant Supreme Court decision was *Whalen v. Roe* (1977). The state of New York proposed a central computer data bank containing the names and addresses of all persons who obtained multiple prescriptions of controlled drugs. The Court upheld the constitutionality of the data bank by stating:

> Disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosure to a representative of the state having responsibility for the health of the community does not automatically amount to an invasion of privacy.

This meant that the Court in *Whalen* essentially required the affected individual to establish the harmful effects of data collection, a direct contrast to the requirement that the state establish the need for intruding into an individual's privacy by collecting personal information. Except for abortion, contraception, and similar circumstances, the Court has not held that a data collection system was invalid because the state could not demonstrate the necessity for the data.

One frequent argument against data collection has been how much it adversely affects individual decisions concerning protected interests. In *Buckley v. Valeo* (1976), the Supreme Court rejected a challenge to the Federal

Election Campaign Act of 1971 (amended in 1974) which requires, in part, that contributions and expenditures above certain threshold levels must be reported and disclosed, because reporting would deter some contributions to unpopular or minority parties. The Court reasoned that such personal effects are too remote to overcome the public interest served by the data collection.

A different result was reached in *NAACP v. Alabama* (1958), previously discussed, in which the Court invalidated a requirement that the National Association for the Advancement of Colored People (NAACP) disclose membership rosters on free association and other grounds. Similarly, while the Court has invalidated state actions that alter a woman's exercise of personal choice concerning abortion, in *Planned Parenthood v. Danforth* (1976) the Court upheld a data collection system concerning abortions where the system was directed merely to statistical purposes to aid the state's interest in public health.

Business Data Storage and Private Control

Many efforts to restrict the types of data that a private entity may collect have focused on improper discrimination in credit or employment relationships rather than privacy. There have been restrictions on the collection of racial, sexual, religious, and marital status data *except* for limited uses by creditors and employers. Common-law tort cases have focused on physical intrusions and eavesdropping. In *Tureen v. Equivas, Inc.* (1978), for example, a federal appellate court suggested that the tort of intrusion into an individual's private affairs might apply to the collection of private information for no legitimate purpose. The Court, thoug[illegible]ected an individual tort claim based on a private investigator's gathering [illegible]f data regarding a number of prior insurance applications. The Court reasoned that his collection was made for a legitimate purpose in connection with an application for insurance.

A major source of private privacy-protection litigation has been the Fair Credit Reporting Act (1970), mentioned earlier. The act had two major goals: to protect individuals from inaccurate reports and to prevent invasions of privacy. FCRA is intended to regulate the extensive use of credit-reporting agencies to obtain data on an individual's credit history. All reports made by consumer-reporting agencies about individuals are covered by FCRA. The Act contains a specific requirement that the reporting agency maintain reasonable procedures to ensure accuracy, which is enforceable by the consumer. Access to personal information is available to the affected consumer so that he or she can tell whether reasonable updating procedures are being maintained.

Standards were enunciated in *Thompson v. San Antonio Retail Merchants Association*, a 1982 decision by the Fifth Circuit Court relating to reasonable updating procedures. The court held that this computer-based credit information procedure amounted to negligence to fulfill its duty to provide for reasonable updates of information. The reporting agency had failed to "exercise reasonable care" when programming its computer to pick up decisive information for the file. Certain "points of correspondence," such as disparities in social security numbers were not checked. The reporting agency relied almost exclusively on decisions by individual merchants to identify a match between a particular applicant and a file in the system. Also, the agency was negligent about correcting errors and continued to mix up the plaintiff's record with that of another person. Although there was no monetary loss to the petitioner, the court awarded damages for the humiliation and distress caused.

In weighing the harmful effects of the invasion of privacy against the benefits to be derived from the disclosure of data, the nature of the data to be disclosed must be considered. Once injurious data are disclosed, it is often difficult to remedy the damage done to an individual's privacy.

Privacy and Electronic Funds Transfer Systems

Recall Joe Bernard's Orwellian society, a computer world where electronic funds transfer systems exist on a national and international basis—the true cashless society. All purchases and bank transactions in a cashless society would be accomplished by computers. Salaries could be deposited by preauthorized credits, while mortgage payments, life insurance, automobile insurance, and hospitalization would be paid by preauthorized debits. The time, place, date, identity of the parties, and goods would also be documented. Electronic fund transfer (EFT) systems create records of events that in a cash-based system leave no retrievable record.

EFT systems today are operated internationally as well as nationally. In comparison to the check-based system where the only parties involved in the transaction are the consumer, the payer bank, the payee bank, and perhaps a clearing facility, EFT systems involve vast numbers of institutions having access to an individual's financial record. In the EFT systems, the consumer has less and less control over the use and accuracy of his or her financial information due to the dispersal of information.

The dispersal of financial information gives an individual consumer reason to be concerned about inaccurate or outdated information that could lead to a poor credit rating. The Privacy Act of 1974 was enacted, in part, to allow consumers to obtain financial records in order to check their accuracy and was supplemented by the Right to Financial Privacy Act of 1978.

Federal law has for some time required the collection of financial information, but it also has limited governmental agencies' access to that information. The Bank Secrecy Act of 1970 required depository institutions to maintain a variety of records pertaining to the financial dealings of customers. This act further authorized the secretary of treasury to require

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Privacy cannot be ensured without security. . . .

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the creation, retention, and submission of records that have a "high degree of usefulness" in criminal, tax, or regulatory activities. Due to these regulations, along with normal business practices, depository institutions commonly created and retained vast amounts of information concerning virtually all but the most insignificant transactions.

Judicial and Legislative Response to Electronic Fund Transfer System

With all of this information being compiled and stored the consumer may expect to have an enforceable right to privacy. The Supreme Court, historically, has tended to disagree. In 1976, the Court, in *United States v. Miller*, held that the customer had no enforceable expectation of privacy for the records held by the bank; therefore, the customer had no standing to litigate government access to his financial records. As a result, the Court validated the bank's handing over the data to a grand jury without the customer's knowledge.

In 1978, Congress overruled this decision by enacting the Right to Financial Privacy Act of 1978. This act sets procedural restrictions on access to data in the possession of a depository institution by federal agencies. Disclosure to an agency is restricted to cases in which the customer authorizes it; there is a proper search warrant, administrative or judicial subpoena; or pursuant to a formal written request where no subpoena or summons authority is empowered to the agency.

Privacy, Security and Crime

In George Orwell's *1984* society, there was no real concern about security of the data bases because there was no privacy left to worry about. Privacy though, in the United States, remains a vital ideal of society. Therefore, with advanced computer technology providing the capability to invade privacy, the issue of security must be addressed.

Privacy cannot be ensured without security, and the distinction between privacy and security is important. By definition, *data security* refers to the protection of data against accidental or intentional disclosure to unauthorized persons or unauthorized modifications or destruction. *Privacy* refers to the right of individuals and organizations to determine for themselves when, how, and to what extent information about them is to be transmitted to others.

As technology advances, and more complex security systems are created, more technologically sophisticated individuals are gaining the capability of breaching security systems. Improper access and dissemination is possible not only by hackers and their like, but also by those in charge of computer systems. This can include the management, the programmer who runs the system, the mechanics who repair the breakdowns, and even those who are in charge of the enterprise and know all the passwords.

Security is really the technical means by which confidentiality is ensured. The degree of protection depends upon several factors, including (1) circumstances of the data bank use, (2) sensitivity of the stored information, (3) its economic value, and (4) its availability for use outside the data bank. Examples of techniques to promote security include passwords, limited access, physical security, and criminal penalties for unauthorized access.

Cryptology encompasses signal security and signal intelligence. Signal security includes ways of keeping human messages secret, including telegrams and telephone conversations and electronic messages between computers. Codes and ciphers enable messages to be disguised. The use of cryptology has great utility in deterring unauthorized persons from intercepting messages passing over lines or by radio signal between users and computer data banks, and the costs of using cryptology may well be worth the potential security insurance.

International Reaction to the Privacy Issue

The problems inherent in our advancing technological society are not unique to the federal government. Many states have had to face the conflicting ideals of technology and privacy. Furthermore, the problems related to advancing technology on privacy are not unique to the United States; they are of concern to other democratic governments as well. It is obvious that the political system of each society is a fundamental force in shaping its balance of privacy, since certain patterns of privacy, disclosure, and surveillance are necessary for particular kinds of political regimes. This is shown most vividly in the contrast between democratic and totalitarian states. The modern totalitarian state relies on secrecy for the regime, but high surveillance and disclosure for all other groups.

Different national attitudes and laws regarding data protection cause difficulties in the international transmission of data. They have also caused some concern regarding privacy. In 1967, the first international conference to study the privacy question was held in Stockholm. The conference concluded that the right to privacy should be held as one of the fundamental rights of mankind, and that all countries should take appropriate measures to protect the right to privacy by legislation or other means. Numerous countries have enacted privacy legislation, including Canada, Sweden, West Germany, France, Norway, Denmark, and Austria. These nations, among others, uphold the importance of protecting confidential, personal information.

The Electronic Communications Privacy Act of 1986

In 1984 and 1985, the American Civil Liberties Union organized several seminars on privacy in communications. A Privacy Working Group emerged from these seminars, which included a broad base of corporations (AT&T, IBM, GET Telenet, for example) and trade associations (Electronic Mail Association, National Association of Manufacturers, Cellular Telecommunications Industry Association). That broad coalition convinced the U.S. Department of Justice to support a privacy bill concerning electronic communications which allowed for subpoena powers for the Department of Justice to conduct criminal investigations. The cellular mobile phone industry was particularly supportive of the bill as a means of ensuring confidentiality for their prospective customers.

The 1986 Privacy Act defined electronic communications and communication systems very broadly, to include virtually all voice and computer-to-computer communications and all computers used to facilitate and store communications. The private, unauthorized interception of electronic communication was made illegal and punishable as a felony, with a fine and up to five years in prison when the interception is for commercial gain. Unauthorized interceptions of cellular mobile phone conversations, paging services, and satellite communications carry lesser penalties. Persons whose communications were intercepted also may sue the perpetrator in court for damages caused by the unauthorized interception.

The government may intercept electronic communications only after obtaining a court subpoena allowing a wiretap. Pen registers must also be approved by a court before being installed. Under carefully defined and court-approved circumstances, delayed notice may be given to the owner of the phone when the contents of electronic communication are disclosed. The order may not be granted unless the court determines that there is reason to believe that notification of the existence of the court order may (1) endanger the life or physical safety of an individual, (2) result in flight from

prosecution, (3) result in destruction of or tampering with evidence, (4) result in intimidation of potential witnesses, or (5) otherwise seriously jeopardize an investigation or unduly delay a trial.

Stored communications are also protected by the 1986 Privacy Act by two classes of offenses defined for their unauthorized interception. For offenses committed for malicious destruction or private commercial gain, the penalty is a fine of up to $250,000 and a maximum one-year sentence. Second offenses will be more severely punished. A second category of private unauthorized interception for *other* than commercial gain, malicious destruction, or private commercial gain, carries a fine of not more than $5,000 and a maximum six months imprisonment. This offense category is aimed at the growing number of youthful computer hackers who make a sport out of breaking into communication systems.

Conclusion

George Orwell's *1984* expresses a mood and issues a warning. The mood is despair about the future of man in a society out of balance; the warning is that unless individual freedoms and rights are protected, people will lose their most cherished liberties and human qualities and become soulless automatons controlled by master technocrats.

Fortunately, the Privacy Act of 1986 expresses a public desire to avoid such a drift in the United States, but it remains for court tests to reveal its strength and the extent of its protection. Looking back over the last two decades, we see that privacy protections have been some years behind the advances in technology and a drift toward an Orwellian society seemed to be a continuing threat.

A 1985 survey by the Office of Technology Assessment, a nonpartisan congressional agency, reflects that trend in its finding that 35 of 142 domestic federal agencies used, or planned to use, electronic surveillance. The 1968 law which dealt mainly with wiretaps and hidden microphones did not apply to newer methods of surveillance, and so agencies, in effect, had *carte blanche* to snoop. Then, with the 1974 and 1978 laws, some regulation of data access and data use was applied. However, with the more recent development of computer conferencing, electronic mail, and cellular phones, along with such devices as tiny television cameras and electronic telephone monitors, our society was fast losing protections of individual privacy.

Congress acted decisively, however, in 1986 to bring regulation in line with the technology. The new act protects *all* personal communications, no matter how they are transmitted. Should a person's messages be intercepted—whether or not injury results—that person may file suit in federal court. Significantly, the law also specifies what the government may and

may not do. For example, it describes procedures for subpoenaing electronic mail and establishes guidelines for the use of monitoring devices. While law enforcement agencies may intercept electronic messages, they must get a court order to do so.

The 1986 Privacy Act is long overdue and is generally welcomed by the electronics industry, the ACLU, the business world, privacy lawyers, Congress, and the Justice Department. Whether or not it will provide a long-time protection of privacy rights as they have evolved under the Constitution remains to be seen; at least it is a reassuring step in the right direction.

ENDNOTES

1. George Orwell, *1984* (New York: Harcourt Brace Jovanovich, 1949).
2. Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967).
3. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* Vol. 4 (1890-91).
4. Vance Packard, Hearings before the Subcommittee on Invasions of Privacy of the House Committee on Governmental Operations, 89th Congress, 2nd Session, 126 (1966).
5. Sen. William Cohen, U.S. Congress, S. 2957, Congressional Record, March 21, 1984.

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SUMMARIES OF CASES

Olmstead v. United States, 277 U.S. 438 (1928).

Olmstead was the leading conspirator and the general manager of a business that violated the National Prohibition Act by unlawfully possessing, transport-

ing, importing, and selling intoxicating liquors and maintaining nuisances. The information which led to the discovery of the conspiracy and its nature and intent was largely obtained by intercepting messages on the telephone of the conspirators by four federal prohibition officers. However, the wiretapping was done outside the residence, and not in the offices but in the basement of the building housing the offices. All conversations were recorded, and the evidence of the wiretapping was used in court against the conspirators. The Court held that evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping, did not amount to violations of the Fourth or Fifth Amendment. The Court limited its consideration to the Fourth Amendment, which did not forbid what was done. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. The language of the amendment cannot be extended to include telephone wires. The Court concluded that "a standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by governmental officials would make society suffer and give criminals greater immunity than has been known before." This decision has been overruled by *Katz v. United States*, 389 U.S. 347 (1967).

NAACP v. Alabama, 377 U.S. 288 (1964).

The Court held that Alabama could not oust the NAACP from the state since that directly involved the freedom of individuals to associate for the collective advocacy of ideas. A state court order compelling a state branch of the NAACP to disclose its membership lists, even when made pursuant to state action to oust the association from the state for carrying on the activities of a foreign corporation without being duly qualified, is likely to constitute an effective restraint on the members' freedom of association. Freedom of association is an inseparable aspect of the "liberty" provision of the due process clause of the Fourteenth Amendment.

Griswold v. Connecticut, 381 U.S. 479 (1965).

Connecticut's birth control law was being constitutionally challenged. The statute provided that "any person who uses any drug, medical article, or instrument for the purpose of preventing conception" was to be subject to fine or imprisonment or both. The statute further specified that a person who assisted another in committing any offense could be prosecuted and punished as if he were the principal offender. Griswold, executive director of the Planned Parenthood League of Connecticut, was convicted of being an accessory. The Court held the Connecticut statute unconstitutional. The decision established a new con-

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Note: Sources utilized included: Paul C. Bartholomew, *Leading Cases on the Constitution* (Totowa, N.J.: Littlefield, Adams and Co., 1980); Paul C. Bartholomew, *American Constitutional Law* (Totowa, N.J.: Littlefield, Adams and Co., 1979); and Bruce E. Fein, *Significant Decisions of the Supreme Court, 1976-1977 Term* (Washington, DC: American Enterprise Institute for Public Policy Research, 1978).

stitutional "right of privacy" really using the Ninth Amendment as a basis. The Court noted that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . .the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several constitutional guarantees. . .we deal with a right of privacy older than the Bill of Rights."

Katz v. United States, 389 U.S. 347 (1967).

Katz was convicted in federal District Court in California of violation of federal communication statutes by transmitting wagering information by telephone from Los Angeles to Miami and Boston. At the trial, evidence was introduced of Katz's telephone conversations at his end overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which Katz had placed his calls. The Court held that the search and seizure was not conducted in compliance with constitutional standards. The Court reasoned that the Fourth Amendment protects people and not simply "areas" against unreasonable search and seizures. The reach of the Fourth Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. The protection does not extend only to tangible property and to incidents where there has been trespass. What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

(The Court overruled *Olmstead v. United States*, 277 U.S. 438 [1928], and *Goldman v. United States*, 316 U.S. 129 [1942].)

Roe v. Wade, 410 U.S. 113 (1973).

Texas statutes prohibited abortions except by medical advice for the purpose of saving the life of the mother. Proceeding under the pseudonym of Jane Roe, a federal class action was instituted against the district attorney of Dallas County challenging the validity of the statutes. When a woman's life did not appear to be threatened by a continuation of the pregnancy, no legal abortion was possible in Texas. The Court held that the term "person" as used in the Fourteenth Amendment did not include the unborn and that a woman has a legitimate right of privacy concerning her decision on an abortion. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." The Court reasoned that although the Constitution does not explicitly recognize any right of privacy, for years the Court has recognized that a right of personal privacy does exist under the Constitution. This has been primarily based upon the Fourteenth Amendment's concept of personal liberty and the Ninth Amendment's reservation of rights to the people. The right of privacy is broad enough to cover the decision as to an abortion. The right is not absolute and is subject to some interests as to protection of health, medical standards, and prenatal life.

Buckley v. Valeo, 424 U.S. 1 (1976).

Congress passed in 1971 and amended in 1974 the Federal Election Campaign Act. This act broadly attempted to limit individual political contributions to $1,000 to any single candidate with an overall annual limitation of $35,000 by any single contributor; contributions and expenditures above certain threshold levels must be reported and disclosed; a system of public financing of presidential campaigns is established in the Internal Revenue Code; and a Federal Election Commission established. The Court held that the Federal Election Campaign Act (1) did not violate the First Amendment's freedom of communication and freedom of association; (2) its subsidy provisions did not violate the General Welfare Clause; and (3) the Commission, as constituted, violates the doctrine of separation of powers. The Court reasoned that "[t]he Act's contributions and expenditure limitations impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate." Although Congress can regulate elections, it does not follow "it must have the power to appoint those who are to administer the regulatory statute" in violation of the appointing clause.

United States v. Miller, 425 U.S. 435 (1976).

By means of a subpoena, the government obtained from two banks copies of checks and other bank records concerning a criminal defendant. The defendant unsuccessfully moved to suppress these items of evidence on the ground that they were seized in violation of the Fourth Amendment because the subpoena was defective. The Court held that the defendant lacked any legitimate expectation that he could prevent the disclosure of his bank records to a third party. His records were required to be maintained under the Bank Secrecy Act; the defendant had no ownership interest in them. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings."

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

Two Missouri-licensed physicians and Planned Parenthood, a not-for-profit Missouri corporation, brought suit challenging the constitutionality of several provisions of the Missouri abortion statute on the ground that they interfered with a mother's right to obtain an abortion. The Court held the challenged provisions of the Missouri abortion statute unconstitutional except for record keeping, reporting, and written consent by the woman. The Court relied on its reasoning in *Roe v. Wade*, 410 U.S. 113 (1973), that a woman's constitutional right of privacy protects her decision whether or not to obtain an abortion. Specifically, the Court concluded that during the first trimester of pregnancy, the state could not regulate the abortion decision. The definition of viability in the Missouri statute was a matter of medical judgment as flexible enough to be held constitutional. The requirement of obtaining a woman's consent

was held constitutional since the state has a legitimate interest in assuring that such a decision is made with full awareness of its significance. Missouri's statutory provisions requiring the spouse's consent or parental consent for minors for abortions during the first twelve weeks was held unconstitutional. The prohibition of saline amniocentesis after the first trimester was held unconstitutional because it was not reasonably related to protecting maternal health.

Whalen v. *Roe*, 429 U.S. 589 (1977).

Concerned that drugs having both legitimate and illegitimate uses were being diverted into unlawful channels, New York passed the Controlled Substances Act, providing for comprehensive regulation of drugs having a potential for abuse. With regard to opium, cocaine, and amphetamines, the act requires that all prescriptions be prepared in triplicate on an official form by a physician. The form requires identification of the prescribing physician, the dispensing pharmacy, the drug and dosage, and the name, address, and age of the patient. One copy of the completed form is sent to a state agency, where its information is transferred to magnetic tapes for processing by a computer. The computer tapes are securely maintained, and public disclosure of the identity of patients is a crime. The Court held that the provisions of the act for recording and maintaining the names and addresses of patients obtaining these drugs pursuant to a doctor's prescription did not violate the patients' constitutional rights of privacy. The state could rationally have assumed that the identification requirements might deter potential violators as well as aid in the detection and investigation of specific instances of apparent drug abuse. Rationality is all the Constitution requires to sustain the exercise of a state's police powers, in the absence of infringement of a constitutionally protected right or liberty under the Fourteenth Amendment.

Tureen v. *Equifax, Inc.*, 571 F 2d. 411 (8th Cir. 1978).

The federal appellate rejected a tort claim based on a private investigator's collection of information concerning a large number of prior insurance applications. This was deemed to have been made for a legitimate purpose in connection with an application for insurance. The court *in dicta* suggested that the tort of intrusion into private affairs might apply to the collection of private information for no legitimate purpose.

Smith v. *Maryland*, 442 U.S. 735 (1979).

The Court held that local authorities did not violate the Fourth Amendment right of Michael Lee Smith when they did not obtain a search warrant before placing a pen register on his telephone to record the numbers he dialed. The Court reasoned that an individual could not have a reasonable expectation of privacy in the numbers he dialed on his telephone and that such data is "voluntarily" provided to the phone company which provides the service and bills the user. The recording of numbers dialed was distinguished from recording conversations, and therefore no warrant was required under the Fourth Amendment.

Thompson v. San Antonio Retail Merchants Association, 682 F 2d. 509 (5th Cir. 1982).

The Court held that a computer-based data collection procedure constituted a negligent failure to fulfill the duty to establish a reasonable updating procedure. The court found that "'[There was negligence] in updating procedures. [The agency] failed to exercise reasonable care in programming its computer to automatically capture information into a file without requiring any minimum number of 'points of correspondence' between the consumer and the file [accepted as accurate by the client].'" A minimum level of objective correspondence between an applicant and a file would have been a reasonable way of avoiding misidentification.

QUESTIONS FOR DISCUSSION

1. Considering the decline of privacy in this era of electronic information technology, how close to Orwell's fictional society has the United States drifted?
2. There is a saying that a person's home is his castle; the assumption is that a person can expect privacy without government interference or public snooping. What are the limits on protections of the privacy of our homes?
3. How have computers complicated the protection of privacy of information—especially in regard to personal finance and credit?
4. What are the specific protections of privacy that have evolved from the Constitution in the last 30 years? What are the legal sources of these protections?
5. What is the relationship between privacy and security? In a democratic society in an era of computer information, what is our constitutional government's role in maintaining this relationship?
6. Looking to the future and considering advancing technology, how secure are the rights of individual privacy?

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ISBN 0-8203-1120-3

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